



[Billing Code 7709-01-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Parts 4000, 4001, 4043, 4204, 4206, and 4231**

**RIN 1212-AB06**

### **Reportable Events and Certain Other Notification Requirements**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

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**SUMMARY:** Under ERISA, pension plans and the companies that sponsor them are required to report to PBGC a range of corporate and plan events. In 2009, PBGC proposed to increase reporting requirements by eliminating most reporting waivers. Plan sponsors and pension practitioners objected, saying that PBGC would have required reports where the actual risk to plans and PBGC is minimal. On reflection, PBGC agrees. This new proposal exempts most companies and plans from many reports, and targets requirements to the minority of companies and plans that are at substantial risk of default.

PBGC developed a revised proposal under the auspices of Presidential Executive Order 13563, which directs agencies to review and revise existing regulations. Under the new proposal, reporting would be waived for most events currently covered by funding-based waivers if a plan or its sponsor comes within a financial soundness safe harbor based on widely available measures already used in business. Waivers for small plans would be expanded and some other existing waiver provisions would be retained with modifications; other waivers would be eliminated.

In this way, PBGC can reduce unnecessary reporting requirements, while at the same time target its resources to plans that are at risk. The revised proposal will exempt more than 90 percent of plans and sponsors from many reporting requirements. Reporting requirements would also be made simpler and more uniform.

PBGC will also provide for more open and extensive public comment on the proposed rule.

**DATES:** Comments must be submitted on or before [insert date 60 days after publication in the **Federal Register**]. A public hearing will be held on June 18, 2013. Outlines of topics to be discussed at the hearing must be submitted on or before June 4, 2013. See **Public Participation** below for more information on the hearing.

**ADDRESSES:** Comments, identified by Regulation Identifier Number (RIN) 1212-AB06, may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov> .  
Follow the Web site instructions for submitting comments.
- E-mail: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov) .
- Fax: 202-326-4224.
- Mail or Hand Delivery: Regulatory Affairs Group, Office of the General Counsel,  
Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026.

All submissions must include the Regulation Identifier Number for this rulemaking (RIN 1212-AB06). Comments received, including personal information provided, will be posted to [www.pbgc.gov](http://www.pbgc.gov). Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW.,

Washington DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

Outlines of topics to be discussed at the public hearing on this rule must be submitted by e-mail to [regs.comments@pbgc.gov](mailto:regs.comments@pbgc.gov) or by mail or courier to Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026. See **Public Participation** below for more information on the hearing.

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion, Assistant General Counsel ([Klion.Catherine@PBGC.gov](mailto:Klion.Catherine@PBGC.gov)), Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington DC 20005-4026; 202-326-4024. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary — Purpose of the Regulatory Action**

This rule is needed to conform PBGC’s reportable events regulation to changes in the law, to avoid unnecessary reporting requirements, to make reporting more efficient and effective, and as a result help preserve retirement plans. It does these things by amending the regulation to track new legal rules, to change the scope of some reportable events, and to replace the existing waiver structure with a new structure including “safe harbors” that relieves reporting burdens on companies and plans where there is little risk to pensions.

PBGC’s legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations

to carry out the purposes of title IV of ERISA, and section 4043 of ERISA, which gives PBGC authority to define reportable events and waive reporting.

## **Executive Summary — Major Provisions of the Regulatory Action**

### *Changing the waiver structure*

Under the current waiver structure for reportable events, PBGC often doesn't get reports it needs; at the same time, it gets many reports it *doesn't* need – reports that are unnecessary. This mismatch occurs because the current waiver structure isn't well-tied to the actual risks and causes of plan terminations.

When a reporting waiver keeps PBGC from learning of a reportable event that presents a high level of risk to a plan, its participants, and the pension insurance system, PBGC loses the opportunity to take protective action. That action might include steps such as involuntary plan termination or negotiation with the plan sponsor to improve plan funding.

But when there is no waiver for a low-risk event, the reporting burden of the plan or sponsor involved outweighs the usefulness of the report to PBGC.

In both these cases, the result is to reduce retirement security. In the former case, PBGC is unable to step in to support plan benefits in a timely way, either because a plan may have been terminated that could otherwise have been preserved, or because an involuntary termination occurred after exposure had increased unreasonably. In the latter case, the unnecessary reporting burden may lead some firms to reconsider their decision to sponsor defined-benefit pension plans.

The most significant provision of this rule is to propose a blueprint for a new reportable events waiver structure that is more closely focused on risk than the current waiver structure. Some waivers that poorly identify risky situations — like those based on an apparently modest

level of plan underfunding — would be eliminated; at the same time, new “safe harbors” would be established — based on financial soundness — that are better measures of low plan risk.

#### *Conforming to changes in the law*

The Pension Protection Act of 2006 (PPA 2006) made changes in the law that affect the test for whether advance reporting of certain reportable events is required. The test is based on the variable-rate premium rules, which PPA 2006 changed. This rule would conform the advance reporting test to the new legal requirements.

#### *Revision of definitions of reportable events*

The rule would simplify the descriptions of several reportable events and make some event descriptions narrower so that compliance is easier and less burdensome. One event would be broadened in scope, and clarification of another event would have a similar result. These changes, like the waiver changes, are aimed at tying reporting burden to risk.

#### *Mandatory e-filing*

The rule would make electronic filing of reportable events notices mandatory. This would further PBGC’s ongoing implementation of the Government Paperwork Elimination Act. E-filing is more efficient for both filers and PBGC and has become the norm for PBGC’s regulated community.

### **Introduction**

On January 18, 2011, the President issued Executive Order 13563 on Improving Regulation and Regulatory Review, directing agencies to review and improve their regulatory processes. In the spirit of Executive Order 13563 and in light of the comments received on its

2009 proposal, PBGC reexamined the reportable events regulation and the proposed amendment with several factors in mind:

- Commenters said that under the 2009 proposal, many companies would have been required to report to PBGC on non-pension-focused activities in circumstances where those activities were unlikely to affect their pension plans.<sup>1</sup> To avoid such a result, PBGC has sought ways to establish safe harbors that waive reporting requirements in such circumstances.
- Since the reportable events program was legislated almost four decades ago, a vast quantity of business and financial information has become available through the internet and other means. As a result, PBGC can require less direct reporting from its insured plans and their sponsors.
- When reporting to PBGC is necessary, to the extent practicable PBGC can and should rely on procedures, documents, and performance standards that are already established and accepted. In short, PBGC is trying not to “reinvent the wheel,” nor does PBGC want to require insured plans and the companies that sponsor them to do so.

#### *Establishing Financial Soundness Safe Harbors*

PBGC proposes to establish safe harbors to enable financially sound businesses and plans to avoid having to report many events, particularly those events that seem to have little chance of threatening pension plans.

- *Establishing Financial Soundness for Companies.* A business would be in the safe harbor if it has adequate capacity to meet its obligations in full and on time, as evidenced by meeting five criteria, including passing a “credit report” test and four other criteria designed to measure various aspects of financial soundness. The credit report test would require that the business have a credit report score from a commercial credit reporting company that is commonly used in the business community and that the score indicate a low likelihood that the company would default on its obligations. (The vast majority of plan sponsors already have credit report scores.) The other criteria would be that the business have: (a) positive net income, (b) no secured debt (with some exceptions, such as purchase-money mortgages and leases), (c) no loan defaults or similar issues, and (d) no missed pension plan contributions (again, with some exceptions). For those in the safe

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<sup>1</sup> Among the many comments received on this point: “...in many situations in which reporting would be required – the reportable event would not create any meaningful risk that the employer would be unable to meet its plan funding obligations.” *ERISA Industry Committee* comment letter, accessible on PBGC’s Web site ([www.PBGC.gov](http://www.PBGC.gov)).

harbor, no post-event reporting would be required for most events to which funding-based waivers currently apply.<sup>2</sup>

- *Establishing Financial Soundness via Plans.* A plan would be in the safe harbor if it were either fully funded on a termination basis or 120 percent funded on a premium basis.<sup>3</sup>

The proposal would also generally provide more small-plan waivers and preserve foreign-entity and *de minimis* waivers but eliminate most other waivers.

In addition, PBGC proposes to simplify reporting rules, to make them more uniform, and where possible to permit submission of information already prepared by plans and companies for other purposes.

### *Impact of Proposal*

Overall, PBGC expects the proposal to exempt or waive more than 90 percent of plans and sponsors from many reporting requirements. The proposal will reduce the burden on the vast majority of companies (estimated at approximately three-fourths) that are financially sound. This reduction may make them less likely to eliminate their defined benefit plans and thereby have a beneficial effect on retirement security generally. In addition, the expansion of small plan waivers could help retention of small plans (which represent about two-thirds of all plans).

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<sup>2</sup> Most reporting requirements under the reportable events regulation call for post-event reports, but in some cases advance reporting is required. The new proposal would conform the advance reporting threshold test to changes in the law and eliminate certain extensions of the time to file (see *Advance-Notice Extensions* below), but would make other changes to advance-notice provisions only where they refer to post-event notice provisions that would be changed. Except as otherwise noted, this preamble discusses post-event reporting only.

<sup>3</sup> The current regulation provides a waiver in some circumstances based on 80 percent funding on a premium basis. However, in PBGC's experience, that test is inadequate, in that many plans that have undergone distress or involuntary termination nonetheless have been 80 percent funded on a premium basis. See *Financial Soundness Safe Harbor for Plans* below.

Burden on plan sponsors with *de minimis* components in their controlled groups will be reduced because the inclusion of additional *de minimis* waivers for certain events will reduce both reporting and the need to monitor for reportable events to which waivers apply.

Some reportable events present little or no risk to the pension insurance system — where, for example, the plan sponsor is financially sound and the risk of plan termination low. Reports of such events are unnecessary in the sense that PBGC typically reviews but takes no action on them. Based on an analysis of 2011 data, PBGC found that the proportion of such *unnecessary filings would be cut by 88 percent* under the proposed regulation.<sup>4</sup> The total number of filings under the proposed rule would be comparable to those under the present regulation, but they would be much reduced compared to the 2009 proposal, and the proportion of unnecessary reports, and the regulatory burden on financially sound sponsors and plans, would be dramatically reduced. Fewer unnecessary reports means a more efficient reporting system and a greater proportion of filings that present the opportunity for increased plan protection through monitoring and possible intervention in transactions based on risk, leading to better protection for the pension insurance system and retirement security generally.

If PBGC gets a reportable event notice, it can intervene earlier in the process. Using data from 2011, PBGC has estimated the benefit of better targeted reporting under the new proposal in terms of the value of early intervention as a creditor where a reportable event may foreshadow sponsor default. Early intervention as a creditor leads to higher recoveries of plan underfunding. PBGC estimates that the value of early intervention would exceed the dollar equivalent of the increased burden associated with the higher rate of targeted reporting by approximately \$3.8 million.

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<sup>4</sup> To 5 percent under the proposal compared to 42 percent under the present regulation.



The methodology of these studies is discussed in more detail under *Executive Order 12866 “Regulatory Planning and Review”* and *Executive Order 13563 “Improving Regulation and Regulatory Review”* at the end of this preamble.

The new proposal is described in more detail below.

## **Background**

The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under section 4007 of ERISA, pension plans covered by Title IV must pay premiums to PBGC. Section 4006 of ERISA establishes the premium rates and includes provisions for determining the variable-rate premium (VRP), which is based on plan funding rules. PBGC’s regulations on Premium Rates (29 CFR part 4006) and Payment of Premiums (29 CFR part 4007) implement the premium rules. A number of other provisions of ERISA, and of PBGC’s other regulations, refer to funding and premium rules. Thus, any change in the funding and premium rules may require corresponding changes in other PBGC regulations.

### *Reportable Events*

One such regulation is PBGC’s regulation on Reportable Events and Certain Other Notification Requirements (29 CFR part 4043), implementing section 4043 of ERISA, which requires that PBGC be notified of the occurrence of certain “reportable events.” Reportable events include such plan events as missed contributions, insufficient funds, and large pay-outs and such sponsor events as loan defaults and controlled group changes. Like section 4043, the reportable events regulation generally requires post-event reporting, but also calls for advance reporting for non-public companies where plan underfunding is large. The threshold test for

advance reporting measures underfunding by reference to VRP quantities (in particular, the values of assets and vested benefits as determined for VRP purposes).

The Pension Protection Act of 2006 (PPA 2006) changed the plan funding rules in Title I of ERISA and in the Internal Revenue Code of 1986 (Code) and amended the VRP provisions of section 4006 of ERISA to conform to the changes in the funding rules. PBGC amended its premium rates regulation and its premium payment regulation accordingly, effective for plan years beginning after 2007. Since underfunding for purposes of reportable events was measured by reference to the VRP, the thresholds for reportable events also had to be modified. Pending the adoption of conforming amendments to the reportable events regulation, PBGC has issued a series of Technical Updates providing transitional guidance on how the PPA 2006 changes affect compliance with the reportable events requirements.<sup>5</sup>

#### *2009 Proposed Rule*

On November 23, 2009 (at 74 FR 61248), PBGC published in the *Federal Register* for notice and comment a proposed rule providing for amendment of PBGC's reportable events regulation to make the advance reporting threshold test consistent with the PPA 2006 funding rules and PBGC's new variable-rate premium rules. The rule also proposed to eliminate most automatic waivers and filing extensions, create two new reportable events based on provisions in

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<sup>5</sup> On November 28, 2007, PBGC issued Technical Update 07-2, providing transitional guidance on the applicability of the changes made by PPA 2006, and the corresponding changes proposed for PBGC premium regulations, to the determination of funding-related amounts for purposes of the reportable events regulation. On March 24, 2008, PBGC issued Technical Update 08-2, providing a waiver for reporting of missed quarterly contributions by certain small employers in 2008. On January 9, 2009, PBGC issued Technical Update 09-1, providing interim guidance on compliance with reportable events requirements for plan years beginning in 2009. On April 30, 2009, PBGC issued Technical Update 09-3, providing a waiver or alternative compliance method (depending on plan size) for reporting of missed quarterly contributions by certain small employers in 2009. On November 23, 2009, PBGC issued Technical Update 09-4, extending the guidance in Technical Updates 09-1 and 09-3 for 2010. On December 3, 2010, PBGC issued Technical Update 10-4, extending the guidance in Technical Update 09-4 for 2011. On December 7, 2011, PBGC issued Technical Update 11-1, extending the guidance in Technical Update 10-4 for 2012. Technical Updates are available on PBGC's Web site, [www.pbgc.gov](http://www.pbgc.gov).

PPA 2006, and make other changes to the reportable events regulation. It also provided for amendment of five other PBGC regulations to revise statutory cross-references and otherwise accommodate the statutory and regulatory changes in the premium rules.

PBGC received comments on the proposed rule from eleven commenters — actuaries, pension consultants, and organizations representing employers and pension professionals. In general, the commenters considered the proposal unduly burdensome, primarily because of the elimination of most reportable event waivers. Several commenters urged PBGC to rethink and repropose the rule to address issues raised by the comments.

#### *Executive Order 13563*

On January 18, 2011, the President issued Executive Order 13563 on Improving Regulation and Regulatory Review (76 FR 3821, January 21, 2011). Executive Order 13563 encourages identification and use of innovative tools to achieve regulatory ends, calls for streamlining existing regulations, and reemphasizes the goal of balancing regulatory benefits with burdens on the public.

Executive Order 13563 also requires agencies to develop a plan to review existing regulations to identify any that can be made more effective or less burdensome in achieving regulatory objectives. On April 1, 2011 (at 76 FR 18134), PBGC published a request for public comments on developing its preliminary review plan. The five responses to this comment request (all from commenters on the 2009 proposal) included comments on the 2009 proposed rule (largely reflective of those submitted previously) as well as comments on the existing regulation.

## *New Proposal*

PBGC has reconsidered the reportable events regulation and the 2009 proposed amendment in the spirit of Executive Order 13563 and in light of the comments. In addition to conforming the reportable events regulation to PPA 2006's changes to the funding and premium rules, this new proposal includes significant changes to address issues under the regulation in a new way and to reduce burden in areas where that can be done without unduly compromising the objectives of section 4043.

In particular, the proposal features the introduction of a newly conceived "safe harbor" from reporting in response to comments suggesting that PBGC reduce reporting where risk to the pension insurance system is low. This safe harbor, applicable to five reportable events, would be based on employer financial soundness (*i.e.*, an employer's capacity to meet its financial commitments in full and on time) as determined through credit report scores and the satisfaction of related criteria. A second safe harbor would be available for plans that could meet one of two funding tests that would be more stringent than those currently provided for existing funding-based waivers. The new proposed rule would also preserve or extend some waivers under the existing regulation that the 2009 proposal would have eliminated.

Under this approach, PBGC would rely more heavily on publicly available sources of information, including information publicly reported to other agencies, to learn about reportable events. As a result, it might take longer for PBGC to learn of some reportable events, but PBGC believes the approach would provide a better balance between the agency's need for information and sponsors' interest in minimizing regulatory burdens on the conduct of their business.

Public comments and regulatory changes (from both the existing regulation and the 2009 proposal) are discussed below in the context of the provisions they relate to.

## **Reportable Events**

PBGC proposes to amend the reportable events regulation to accommodate the changes to the funding and premium rules; to replace many automatic waivers with a new and simpler system of waivers featuring “safe harbors” for five events based on plan sponsors’ financial soundness and on high levels of plan funding; and to make other modifications.

Reports required by section 4043 of ERISA tell PBGC about events that may presage distress termination of plans or require PBGC to monitor or involuntarily terminate plans. These important reporting requirements are designed to protect participants and PBGC. When PBGC has timely information about a reportable event, it can take steps to encourage plan continuation — for example, by exploring alternative funding options with the plan sponsor — or, if plan termination is called for, to minimize the plan’s potential funding shortfall through involuntary termination and maximize recovery of the shortfall from all possible sources. Without timely information about a reportable event, PBGC typically learns that a plan is in danger only when most opportunities for protecting participants and the pension insurance system may have been lost. But while such information can be critical to the protection of the pension insurance system, the circumstances surrounding some events may make reporting unnecessary. Thus, the regulation includes a system of waivers and extensions to ease reporting burdens in certain cases.

### *Automatic Waivers and Extensions — Overview*

Section 4043.4 of the reportable events regulation provides that PBGC may grant waivers and extensions case by case. In addition, the existing regulation provides automatic waivers and extensions for most of the reportable events. For example, waivers are provided in some cases for small plans, for plans that meet certain funding tests, or for events affecting *de minimis* segments of controlled groups or foreign entities. In cases where it may be impossible to know

by the filing due date whether criteria for a particular waiver are met, an extension gives a potential filer an opportunity to determine whether the waiver applies.

PBGC proposes to replace many of these automatic waivers with a new and simpler system, including many of the automatic waivers currently available and featuring new automatic waivers that would apply where a sponsor or plan comes within a financial soundness safe harbor.<sup>6</sup> The proposal would retain the complete waivers provided for certain statutory events — in §§ 4043.21 (disqualification or noncompliance), 4043.22 (amendment decreasing benefits), 4043.24 (termination), and 4043.28 (merger, consolidation, or transfer) — that have been replaced by events defined in the regulation. PBGC also proposes to eliminate the automatic extensions under the existing regulation. These extensions are currently needed because many existing waivers are based on facts that may not be known when an event occurs. Since waivers of this kind are being replaced, related extensions are no longer needed.<sup>7</sup>

To give plans and sponsors time to institute any necessary event-monitoring programs and otherwise adjust to changes in the regulation, PBGC is proposing to defer the applicability date of the final rule.

PBGC's experience indicates that many of the automatic waivers and extensions in the existing reportable events regulation are depriving it of early alerts that would enable it to mitigate distress situations. For example, the 2009 proposed rule noted that of the 88 small plans terminated in 2007, 21 involved situations where, but for an automatic waiver, an active

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<sup>6</sup> See **Summary Chart**, below, for an overview of waivers and safe harbors under the current regulation, the 2009 proposal, and this proposed rule.

<sup>7</sup> The proposed rule would provide extensions for small plans to determine whether they satisfied the plan financial safe harbor test based on plan funding on a premium basis. There would also be an extension to provide plans time to determine whether the year-end active participant count showed that an active participant reduction event had occurred by attrition at the end of the year.

participant reduction reportable event notice would have been required an average of three years before termination. Had those notices been filed, the need for some of those terminations might have been avoided, and PBGC might have been able to reduce the impact of other terminations on the pension insurance system.<sup>8</sup> Concerns of this kind led PBGC in 2009 to propose the elimination of most automatic waivers in the reportable events regulation.

The commenters uniformly opposed the proposal to eliminate most waivers. Commenters said that the increase in the public's burden of compliance would outweigh the benefit to the pension insurance system of the additional reporting. They averred that the circumstances in which existing waivers apply pose little risk to PBGC and expressed concern that the proposed changes to the rule would discourage employers from continuing to maintain pension plans covered by Title IV.

In response to the comments, PBGC has attempted to identify circumstances that appear less likely to call for involuntary plan termination and is now proposing a new set of automatic waivers more appropriately tailored to focus on such situations. In particular, PBGC proposes to create safe harbors based on sponsor and plan financial soundness. These safe harbors would apply to post-event reporting requirements for the events of active participant reduction, distribution to a substantial owner, controlled group change, extraordinary dividend, and transfer of benefit liabilities — all the reportable events to which a funding-based waiver applies under

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<sup>8</sup> Examples of the value of early alerts in mitigating distress situations can also be found in other PBGC programs. For example, as part of its Early Warning Program, PBGC negotiated substantial protections from Daimler AG for the pension plans of Daimler's former Chrysler North America division, and the Chrysler plans remain ongoing today. In another case, PBGC negotiated substantial protections under ERISA section 4062(e) for a plan sponsored by Visteon Corporation. When the company filed for Chapter 11 protection in 2009, the company initially contemplated terminating three of its four pension plans, and shifting the obligations to the PBGC's insurance program, which would have caused \$100 million in benefit reductions for the company's 22,000 workers and retirees and added more than \$500 million to the PBGC's shortfall. However, due in part to the negotiated protections, all of the company's pension plans remain ongoing today.

the existing regulation, except liquidation and loan default. PBGC feels that the occurrence of one of these latter two events is at odds with the premise of financial soundness underlying the safe harbor and portends likely deterioration in plan funding due to missed contributions. (As discussed below, this consideration would not apply if the event qualified for a foreign-entity or *de minimis* waiver.)

#### *Financial Soundness Safe Harbor for Plan Sponsors*

Many commenters on the 2009 proposal contended that if funding-based waivers were eliminated, plans and plan sponsors would be required to report events posing minimal risk to PBGC and the pension insurance system. To address the issue of risk, PBGC proposes to provide a risk-based “safe harbor.” PBGC is open to suggestions from the public to help identify existing, widely accepted standards that could form the basis for such a safe harbor. Pending such suggestions, PBGC is proposing, as discussed below, to base the safe harbor on the adequate capacity of an employer to meet its financial commitments in full and on time based on a combination of five factors, including a standard of financial strength reflected by commercial credit report scores and four confirmatory standards.

The new safe harbor would generally apply if, when a reportable event occurred for a plan, the applicable financial soundness criteria were met by the plan’s contributing sponsor<sup>9</sup> or (where the contributing sponsor was a member of a controlled group) by the contributing sponsor’s highest U.S. parent in the controlled group (that is, the highest level U.S. company in the group that was in the contributing sponsor’s chain of ownership). For a change in contributing sponsor, the criteria would be applied to the post-transaction sponsor group; for a

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<sup>9</sup> For multiple employer plans, all sponsors would have to qualify.



transfer of benefit liabilities, the criteria would be applied to both the transferor and the surviving transferee plans' sponsor groups. The regulation would refer to an entity that satisfied the applicable criteria as "financially sound."

Focusing on the financial soundness of the plan sponsor (rather than just the funding level of the plan) is consistent with section 4041 of ERISA, which permits distress termination of underfunded pension plans only in situations where plan sponsors are in bankruptcy or severe financial straits. This safe harbor proposal reflects PBGC's experience that the financial soundness of a plan sponsor generally correlates inversely with the risk of an underfunded termination of the sponsor's pension plan. One major component of the risk of underfunded termination is the likelihood that the plan sponsor will, within the near future, fall into one of the "distress" categories in section 4041(c)(2)(B) of ERISA (liquidation, reorganization, or inability to pay debts or support the plan). Another is that the sponsor will go out of business, abandoning the plan and forcing PBGC to terminate it under section 4042 of ERISA. Thus, the risk of underfunded termination of a plan within the near future depends most significantly on the plan sponsor's financial strength.<sup>10</sup>

In particular, PBGC believes the ability of a sponsor to meet its senior unsecured debt obligations reflects the sponsor's ability to meet pension plan funding obligations because of the parity in bankruptcy of senior unsecured debt and pension plan obligations. PBGC's experience with its Early Warning Program<sup>11</sup> suggests that the higher the financial quality of a plan sponsor, the greater is the sponsor's commitment to its pension plan and its ability to meet its pension

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<sup>10</sup> In 2011, 90 percent of reportable events reports from filers that were below investment grade resulted in the opening of case files. For this purpose, "investment grade" means a credit rating of Baa3 or higher by Moody's or BBB- or higher by Standard and Poor's.

<sup>11</sup> See Technical Update 00-3.

funding obligations. And analysis of PBGC data indicates that the credit ratings of sponsors of the vast majority of underfunded plans taken over by PBGC were below investment grade for many years before termination.<sup>12</sup>

Typically, sponsors of pension plans that present the greatest exposure for PBGC (large plans that are not fully funded) are rated by one or more large nationally recognized statistical rating organizations (NRSROs) that are registered with the Securities and Exchange Commission. These NRSRO ratings are among the most well-known and widely used measures of financial soundness for such large plan sponsors. But while credit ratings of a plan sponsor or its senior unsecured debt obligations would seem to be a good basis for a financial soundness safe harbor, many plan sponsors (primarily small plan sponsors) do not have such ratings. Furthermore, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203) requires federal agencies to remove references to and requirements of reliance on credit ratings in regulations.<sup>13</sup>

To avoid these drawbacks, PBGC proposes to use, as one of five criteria of financial soundness, credit scores reported by commercial credit reporting companies (CCRCs), which are already issued for the vast majority (over 90 percent) of businesses that sponsor plans covered by Title IV of ERISA. These commercial ratings are substantially different from traditional credit ratings. A CCRC generally assesses the creditworthiness of a business by reference to the ability of the business to pay its trade and other debts rather than by reference to the financial strength of the business reflected in financial statements (as credit rating agencies do). Just as a

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<sup>12</sup> See Private Pensions, Recent Experiences of Large Defined Benefit Plans Illustrate Weaknesses in Funding Rules, GAO, May 2005, <http://www.gao.gov/new.items/d05294.pdf>, p. 30. For this purpose, GAO considered “investment grade” to correspond to a rating of BBB or higher.

<sup>13</sup> See section 939A of the Dodd-Frank Act.

company's credit score is used by prospective creditors in evaluating the probability that an obligation will be paid, PBGC believes that it can appropriately use such scores as a measure of financial strength, which in turn is an indicator of the level of risk that a company will fail to meet its pension plan funding obligations. CCRCs are not within the purview of the Dodd-Frank Act since the relevant provisions cover credit ratings and credit rating agencies but not credit reporting companies (or, by implication, the credit scores and reports they produce).<sup>14</sup>

To make the credit scores underlying this test for the financial soundness safe harbor as reliable and as uniform as possible, and minimize the burden of obtaining such scores, PBGC proposes to require that a credit score be reported by a CCRC that is commonly used in the business community (*e.g.*, Dun & Bradstreet<sup>15</sup>). To satisfy this criterion for the financial soundness safe harbor, the credit report of a plan sponsor (or highest U.S. parent) by a CCRC that is commonly used in the business community would have to reflect a credit score indicating a low likelihood that the company would default on its obligations.

Scores that satisfy the standard in the regulation may change over time, because of changes in scoring methods or for other reasons. PBGC will provide, and update as necessary, reportable events filing instructions to guide filers in determining whether their credit scores meet the standard. The instructions will include one or more examples of scores by commercial

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<sup>14</sup> The Securities Exchange Act of 1934 (the Exchange Act), which is amended by relevant portions of the Dodd-Frank Act, defines a "credit rating" as an assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments and a "credit rating agency" as any entity engaged in, among other things, the business of issuing credit ratings. See sections 3(a)(60) and (61) of the Exchange Act. However, the definition of credit rating agency under section 3(a)(61) of the Exchange Act specifically "does not include a commercial credit reporting company."

<sup>15</sup> Dun & Bradstreet provides free credit reports to companies willing to provide certain financial information for analysis and a free alert system to inform companies of changes in their credit scores (to permit inexpensive monitoring) and issues credit reports on at least 90 percent of sponsors of PBGC-covered plans. The United Kingdom's Pension Protection Fund, which performs pension protection functions like PBGC's, uses Dun & Bradstreet analyses to measure the risk of insolvency of sponsoring employers.

credit reporting companies commonly used in the business community that indicate a low likelihood that a company will default on its obligations. To give an idea of the level of score that PBGC has in mind, a minimum Dun & Bradstreet financial stress score of 1477 would have satisfied the standard in 2011.

PBGC invites commenters to identify CCRCs other than Dun & Bradstreet that are commonly used in the business community now and to suggest ways that PBGC can remain currently informed of the identity of all such CCRCs as usage by the business community changes over time.

This financial strength criterion relies on private-sector commercial credit scores that most plan sponsors (or their U.S. parents) already have and that are used in a wide variety of business contexts. Such scores represent well known, objective, non-governmental assessments of financial soundness. PBGC would not itself evaluate the creditworthiness of plan sponsors as a condition to sponsors' use of the safe harbor. Sponsors would not have to certify or prove creditworthiness to PBGC — or even report a credit score — in order to take advantage of the safe harbor. For a sponsor not currently the subject of credit reporting, PBGC believes it would entail minimal effort and expense to have a CCRC that is commonly used in the business community begin issuing such reports on the sponsor.<sup>16</sup> As discussed below under *Small-Plan Waivers*, small plans would have separate exemptions.

As stated above, a sponsor would come within the financial soundness safe harbor if it passed the “credit report” test and in addition satisfied four further criteria.

One of these further criteria for the sponsor financial soundness safe harbor would be based on whether the sponsor (or its highest-level U.S. parent) has secured indebtedness. A

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<sup>16</sup> A company may have its credit score reported by a CCRC simply by providing relevant data to the CCRC.

lender's insistence on security reflects a level of concern over whether its loan will be timely repaid, typically because it judges that the borrower's creditworthiness is questionable. Thus, in general, if a company is forced to make use of secured debt, there is the suggestion of risk of loss that must be mitigated by the securing of collateral. If the borrower is a plan sponsor, there is a concomitant risk of underfunded plan termination during that same time frame. Conversely, this implication of risk does not arise where a company is not forced to borrow with security. Thus, an absence of secured indebtedness tends to be associated with a greater degree of financial soundness.

For purposes of this test, PBGC would except indebtedness incurred in connection with the acquisition or improvement of property and secured only by that property — such as mortgages and equipment financing (including capital leases). Secured debt of this kind is not uncommon even for financially sound businesses. But PBGC is aware that there may be other circumstances in which a company capable of borrowing without security might nonetheless choose to offer security to a lender — for example, if doing so would significantly reduce the cost of a loan. PBGC seeks public comment on the extent to which the proposed no-secured-debt test might be failed by plan sponsors whose risk level is in fact as low as that of other sponsors capable of passing the test. PBGC also seeks suggestions for ways to modify the no-secured-debt test — for example, by carving out a wider class of debt than purchase-money obligations — to make it correspond better with commercial reality.

Another criterion for the sponsor financial soundness safe harbor would be that, for the past two years, the sponsor (or its highest-level U.S. parent) has had positive net income under generally accepted accounting principles (GAAP) or International Financial Reporting Standards (IFRS). This requirement serves to confirm both that the business is successful and that it has

been operating for at least two years. (For non-profit entities, “net income” would be measured as the excess of total revenue over total expenses as required to be reported on Internal Revenue Service Form 990.)

In this connection, PBGC seeks public comment on the extent to which there are companies whose financial statements are not prepared using GAAP or IFRS but whose income level is comparable to the standards proposed for this criterion. PBGC seeks suggestions for supplementing the GAAP/IFRS standards with alternative standards to accommodate such companies.

The two remaining criteria are intended similarly to supplement and confirm the general picture of financial soundness painted by the satisfaction of the credit report test. These two requirements would be that the business have no debt service problems and be current with its pension plan contributions. More specifically:

- For the past two years, the business would have to have not met the criteria for an event of default with respect to a loan with an outstanding balance of \$10 million or more, regardless of whether the default was cured or if the lender entered into a forbearance agreement or waived the default. Defaults on credit agreements suggest the business may be underperforming and at greater risk of not meeting its debt obligations.
- For the past two years, the business would have to have no missed pension contributions, other than quarterly contributions for which reporting is waived. Like the debt service requirement, this criterion addresses the likelihood that the business will reliably fund its pension plans.

Because of the novelty of the sponsor financial soundness standard and in the spirit of E.O. 13563’s call for greater public participation in rulemaking, PBGC specifically invites public comment on the new risk-based financial soundness safe harbor for plan sponsors, as well as suggestions from the public for other tests or combinations of tests on which the sponsor financial soundness safe harbor might be based. PBGC seeks answers to the questions listed

under **Public Participation** below and suggestions for alternative approaches to determining financial soundness based on widely-available and accepted financial standards.

#### *Financial Soundness Safe Harbor for Plans*

Most of the commenters opposed the elimination from the reportable events regulation of automatic reporting waivers based on plan funding, as proposed in 2009. PBGC now proposes to retain plan funding as a basis for relief from filing requirements for the same five events as the sponsor financial soundness safe harbor discussed above, by providing new “safe harbors” based on plan financial soundness. The standard of financial soundness for these new safe harbors would be a plan’s funding status. A special rule would accommodate the needs of small plans in determining funding status.

The safe harbors would be less complex than the current funding-based waivers. The current regulation provides funding-based waivers with several different thresholds — for example, waivers are available where a plan pays no variable-rate premium,<sup>17</sup> has less than \$1 million in unfunded vested benefits, or is 80 percent funded for vested benefits. Some waivers are based on a combination of a funding criterion and a non-funding criterion — for example, reporting of a controlled group change event is waived where a plan is 80 percent funded and the plan sponsor is a public company. Different waiver criteria or combinations of criteria apply to different events. PBGC’s proposed safe harbors for financially sound plans would involve just two alternative tests, which would be the same for all events covered by the safe harbors.

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<sup>17</sup> In general, the variable-rate premium is based on unfunded vested benefits. However, in some cases no variable-rate premium might be owed because of an exemption. For example, before 2008, ERISA provided an exemption from the variable-rate premium for a plan at the “full-funding limit,” even if the plan had unfunded vested benefits. The exemption was removed by PPA 2006.

Both tests (like most of the current funding-based waiver tests) would be based on plan funding level, which is a comparison of assets to liabilities. Determining liabilities — calculating a present value for the obligation to pay benefits for years into the future — requires that actuarial assumptions be made about such things as the rate of return on investments, when participants are likely to retire, and how long they are likely to live. The actuarial assumptions used, and thus the present value arrived at, may differ significantly depending on whether the plan is considered “ongoing” — that is, expected to continue in operation indefinitely — or terminating. For example, assumptions about when participants will retire would be different for an ongoing plan than a terminating plan; in a terminating plan, participants generally retire earlier and may receive early retirement subsidies. Liabilities — the present value of future benefits — are typically higher on termination assumptions than on ongoing assumptions, and thus, for a given amount of assets, a plan’s termination-basis funding percentage is typically lower than its funding percentage on an ongoing basis.

From PBGC’s perspective, it is more appropriate to measure plan funding levels using termination-basis assumptions than ongoing-plan assumptions because termination is what brings a plan under PBGC administration. In the context of the pension insurance system, a plan’s funding level on a termination basis provides the better measure of exposure — that is, the magnitude of the financial impact PBGC and participants would suffer if the plan then (or soon thereafter) terminated. But from a plan perspective, funding on an ongoing basis is the more common measure. Variable-rate premiums, required contributions, benefit restrictions, and annual funding notices are all based on ongoing-plan calculations. Unless filing is required under ERISA section 4010 (dealing with annual financial and actuarial information reporting for controlled groups with large underfunding), plans typically do not calculate funding on a



termination basis. PBGC considers it desirable to adopt a funding measure that links with calculations that plans already make.

The funding-based waivers in the existing regulation are generally tied to variable-rate premium computations,<sup>18</sup> which use ongoing-plan assumptions. Under the current regulation, plans that are funded for 80 percent of premium liability qualify for reporting waivers for several reportable events. PBGC has found this test to be an inadequate threshold measure, because premium liability is significantly lower than termination liability, so that a plan that is 80 percent funded on a premium basis is likely to be much more significantly underfunded on a termination basis. In developing the revised plan funding safe harbor thresholds, PBGC reviewed plans with at least 100 participants that PBGC trustee in fiscal years 2009 and 2010 and through April of fiscal year 2011 and compared the funded percentage at the date of plan termination (DOPT) measured on a termination basis to the VRP funded percentage for the plan year before the year in which DOPT occurred.<sup>19</sup> This analysis showed that the average termination funded status at DOPT was 54 percent and the average VRP funded status for the year before DOPT was 84 percent. The analysis also showed great variability of funded status among the plans, and PBGC found no direct correlation between the two funding measures.

If a plan is fully funded on a termination basis, on the other hand, any risk associated with a reportable event can reasonably be ignored because the exposure can reasonably be considered to be zero. PBGC therefore proposes to provide a safe harbor from reporting for

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<sup>18</sup> The sole exception is a waiver for the benefit liability transfer event, which applies if (among other things) the transferor and transferee plans are fully funded using the computation methods for calculating employer liability for terminated plans.

<sup>19</sup> Some 134 plans fall into this category, but 17 were excluded because of incomplete or questionable data.

most of the events to which funding-based waivers now apply<sup>20</sup> if the plan involved is fully funded on a termination basis on the last day of the plan year preceding the event year. But since funding on a termination basis is not commonly calculated for most plans — and since PBGC wants to provide another way to qualify for the safe harbor that is more accessible and yet provides a reasonably low exposure when compared to a termination-basis measurement — PBGC is also proposing to extend the safe harbor treatment to any case where the plan involved is 120 percent funded on a premium basis for the plan year preceding the event year.<sup>21</sup>

The 20-percent cushion is needed to help compensate for several differences between the termination-basis funding level and the VRP-basis funding level. First, the VRP funding level is to be measured in general one year earlier than the termination funding level.<sup>22</sup> The lapse of a year raises the risk that funding will deteriorate between the measurement date and the event date. Second, the VRP funded percentage is calculated with ongoing-plan assumptions, which (as discussed above) generally yield higher funding percentages than termination-basis assumptions. Third, premium liability reflects only vested benefits, whereas termination liability is based on all benefits.<sup>23</sup>

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<sup>20</sup> As discussed above under *Automatic waivers and extensions — overview*, PBGC proposes to exclude the liquidation and loan default events from the funding-based waiver because those two events imply sponsor financial difficulties that may affect plan contributions and lead to a decline in funding level.

<sup>21</sup> Variable-rate premium (“VRP”) funding information for a plan year is generally unavailable until the latter part of the year or (for many small plans) the early part of the following year. Thus it is more feasible to base the safe harbor test on premium information for the year before the event year. One of the reasons PBGC chose the ratio of assets to liabilities calculated according to premium rules as the standard for the funding-based safe harbor, rather than the vested portion of the funding target attainment percentage (“FTAP”) defined in section 430(d)(2) of the Internal Revenue Code, is that the FTAP is not reported (and may not be calculated) until a year later than the VRP. Another reason is that the VRP is determined using current market value of assets, whereas the FTAP often reflects an actuarially smoothed assets figure.

<sup>22</sup> For some small plans, premium funding is computed later in the premium payment year and thus nearer (or on) the proposed date for determining termination-basis funding.

<sup>23</sup> PBGC’s obligation to pay non-vested benefits is conditioned on the availability of funds from plan assets or recoveries of employer liability for plan underfunding.

As noted above, PBGC data indicate that funded status on a termination basis in the recent past was about 30 percentage points lower than the prior year's VRP funded status. Thus, while a 20-percent VRP cushion will be in some cases more and in others less than enough to reduce exposure to the same near-zero level as full funding on a termination basis, it should overall give an acceptable result for purposes of this safe harbor.

One difficulty with tying the safe harbor to the prior year's premium calculations is that a small plan's premium calculations may be as of a date as late as the last day of the year. For this reason, the premium filing due date for plans with fewer than 100 participants is four months after the end of the premium payment year. To address this situation, PBGC proposes to give a filing extension, in cases where the plan is small, until one month after the prior year's premium filing due date (*i.e.*, five months after the end of the prior year). For a small calendar-year plan, this would mean that for the five reportable events subject to the proposed funding-based safe harbor, the notice date for an event that occurred from January 1st through May 1st would be May 31st.<sup>24</sup>

The corresponding extension under the current reportable events regulation is available only if the plan would have qualified for the funding-based waiver for the preceding year. The proposed rule omits this qualification. Where an event subject to the safe harbor involves a small plan that does not qualify for the safe harbor, therefore, PBGC would get notice of the event as much as three months later than the generally applicable deadline. This delay might significantly impair PBGC's administration of Title IV of ERISA for such plans. On the other

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<sup>24</sup> No such extension would be needed for plans with 100 or more participants. Such plans calculate premiums as of the first day of the plan year and file premium declarations well before the end of the plan year. Thus, for example, a calendar year plan should know by October 15, 2013, whether it qualified for the premium-based funding safe harbor for events in 2014.

hand, an unconditional extension is simpler, and PBGC prefers that the relief provided by this small-plan extension not be diluted with complexity. Considering the lower exposure typically associated with small plans, PBGC is proposing to accept the (probably modest) impairment of its enforcement function in order to make compliance easier for such plans.

#### *Other Safe Harbor Proposals*

Alternatively or in addition to the safe harbor proposals described above, PBGC is inviting the public to propose variant safe harbors that build on the same risk-related concepts by altering the mix and/or relative stringency of the constituent tests of the sponsor safe harbor or combining tests from the sponsor and plan safe harbors. Ideally, proposals would reduce reporting burden for plans and sponsors for which reportable events most likely do not pose risks for the pension insurance program and thus focus reporting on higher-risk events. (See **Public Participation** below.)

#### *Small-Plan Waivers*

Rather than eliminating the small-plan waiver for active participant reductions (as it proposed in 2009), PBGC now proposes to retain a modified version of the waiver and to make it applicable to more events. Some commenters expressed concern about the adverse effect on small plans of eliminating waivers and extensions for reporting active participant reductions, pointing out that loss of a handful of employees as a result of normal turnover in a small company could cross the reporting threshold but be unrelated to financial distress.

As noted in the preamble to the 2009 proposed rule, PBGC data suggest that in nearly a quarter of small-plan terminations, the small-plan reporting waiver has prevented PBGC from learning about problems that might have been resolved through early outreach to plan sponsors, avoiding termination or reducing underfunding. Information from other sources (for example,

Form 5500) is typically neither as detailed nor as timely. On the other hand, PBGC can get such information without imposing any additional burden on plans and sponsors. Weighing the disadvantages of relying on these other sources of information against the challenges faced by small plans and their sponsors in reporting active participant reduction events, PBGC is now proposing to provide a waiver for these events like the existing small-plan waiver, except that, for simplicity, small-plan status would be determined in the same way as for purposes of the premium filing rules.

In addition, PBGC proposes to extend the small-plan waiver to three other events: controlled group changes, benefit liability transfers, and extraordinary dividends. Like active participant reductions, these events tend to be less serious than the events for which the safe harbors are unavailable. Furthermore, small plan sponsors typically are not members of controlled groups and generally do not have multiple lines of business. Thus stock or asset spinoffs (which could result in benefit liability transfers) and controlled group changes in general are infrequently experienced by such plans and sponsors. And extraordinary dividend events are relatively unusual for sponsors of plans of any size. In contrast, the burden on small plans and sponsors of monitoring for and reporting these events is relatively significant. Weighing that burden against the number and significance of the resultant reports, PBGC has concluded that small-plan waivers for these events seem appropriate.

#### *Foreign-Entity and De Minimis Waivers*

The current reportable events regulation provides reporting waivers for several events where the entity or entities involved in the event are foreign entities or represent a *de minimis*

percentage of a controlled group.<sup>25</sup> PBGC's 2009 proposal preserved most *de minimis* waivers in the existing regulation but eliminated all foreign-entity waivers, because an increasingly large part of PBGC's insurance supervision and compliance cases deal with foreign controlled group members — a logical consequence of the globalization of the economy. All members of a plan's controlled group, whether domestic or foreign, are liable for plan underfunding. PBGC now proposes to provide both *de minimis* and foreign-entity waivers in tandem for five reportable events.

A number of commenters made the point that it can be difficult for a plan to keep track of events involving foreign controlled group members and argued that events involving foreign entities are too remote to warrant reporting to PBGC. Particular events mentioned in this regard included loan defaults, bankruptcies, controlled group changes, and extraordinary dividends. Commenters also expressed the view that PBGC's processing burden for reports on events involving foreign entities would be disproportionate to the value of the information in the reports, with the implication that requiring such reports would result in a misallocation of PBGC's resources.

PBGC is persuaded that the challenges a plan or sponsor faces in keeping informed about events involving foreign members of the plan's controlled group may prove more burdensome than is currently required to protect the pension insurance system. Furthermore, multinational controlled groups that report publicly tend to be tracked by PBGC's Early Warning Program, which, while it is no substitute for reportable event reports, does give PBGC some idea of the

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<sup>25</sup> Both types of waiver apply to controlled group change, liquidation, and extraordinary dividend; the foreign entity waiver also applies to loan default and bankruptcy. The foreign entity waiver is limited to entities that are not direct or indirect parents of contributing sponsors, and discussion of the foreign-entity waiver in this preamble should be understood to incorporate this limitation.

status of such groups. PBGC has concluded that these considerations constitute an appropriate basis for providing relief from reporting, even though that means it must forgo the receipt of useful information that may be important to its monitoring and enforcement activities.

Accordingly, PBGC now proposes to preserve all post-event foreign-entity reporting waivers in the existing regulation. As with all regulatory provisions, PBGC will monitor developments in this area and may revisit this position if experience indicates a need for stronger monitoring mechanisms. In addition, PBGC now proposes to retain all post-event reporting waivers for *de minimis* transactions<sup>26</sup> and to add *de minimis* waivers for two events — loan defaults and non-bankruptcy insolvency<sup>27</sup> — that do not have such waivers under the existing regulation. Thus, this pair of waivers would apply to five events. For liquidation, loan default, and insolvency, the *de minimis* waiver would be available only if the entity involved in the event was not a contributing sponsor. The waiver would use the ten percent *de minimis* standard, even for extraordinary dividends and stock redemptions under § 4043.31, for which the existing *de minimis* waiver is limited to a five percent segment of a controlled group.

#### *Effect of Proposal on Loan Agreements*

Some commenters said that, for plan sponsors with loan agreements, the increased reporting resulting from the elimination of waivers could give rise to events of default, a view that PBGC has been unable to substantiate. The commenters, who also said that requiring more

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<sup>26</sup> PBGC proposes to eliminate one of three alternative tests for the annual operating income criterion that must be met for *de minimis* status: that such income not exceed 5 percent of the first \$200 million in controlled group net tangible assets. PBGC believes that the other two alternatives provide a sufficient threshold. The change would apply to both post-event and advance notices.

<sup>27</sup> PBGC can obtain bankruptcy filings directly, so a separate PBGC report is unnecessary. For this reason, PBGC proposes to revise the reportable event covering bankruptcy and similar settlements to limit it to non-bankruptcy events only. See *Bankruptcy and Insolvency* below.

reporting could preclude future loans or provide lenders with a pretext for renegotiating loan terms, did not provide any actual loan agreement provisions to support these contentions; to clarify its understanding of the commenters' concerns, PBGC reviewed 25 credit agreements from 20 distressed and/or small public companies.<sup>28</sup> PBGC reasoned that lenders to distressed companies would tend to be particularly sensitive to reportable events and that this heightened sensitivity would be reflected in loan agreement provisions of the kind that commenters expressed concern about. The smaller reporting companies provided a proxy for non-public companies (for which loan agreements are generally not made public).

- An event of default would not be automatically triggered by a reportable event in any of the 25 agreements reviewed, and 17 of the agreements would not have been affected at all by the changes in the 2009 proposed rule. For each of the eight agreements with event-of-default provisions that would have been affected by the 2009 proposal, an event of default would occur only when a reportable event was accompanied by some other significant condition, such as incurring actual liability, creation of grounds for termination, or the occurrence of a material adverse effect.
- Nine of the agreements PBGC reviewed had no requirement that the borrower notify the lender of a reportable event. Six agreements required notice only if some other condition was present (as for events of default). Five defined "reportable event" without regard to whether reporting was waived.
- Fewer than half of the agreements surveyed required representations or warranties about reportable events as a condition to future advances.

The results of examining these loan agreements are consistent with PBGC's experience from reviewing loan documents as part of its direct monitoring of corporate events and

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<sup>28</sup> PBGC obtained the loan agreements from the Web site of the Securities and Exchange Commission ([www.sec.gov](http://www.sec.gov)). The companies with distressed plans were selected from an online business article titled "40 Companies Sitting on Pension Time Bombs," posted at <http://moneycentral.msn.com/content/P87329.asp>, on August 25, 2004. PBGC found no relationship between the assumed financial straits of the companies' plans and any specific loan agreement provisions that might have reflected lenders' sensitivity to the significance of reportable events. The limited scope of this study reflects the practical difficulty of obtaining and reviewing a statistically significant sample of loan agreements (the vast majority of which are not publicly available) involving sponsors of the more than 27,500 single-employer plans covered by Title IV of ERISA. PBGC nonetheless believes that the loan agreements that were reviewed do offer some insight into loan agreement drafting practices that is relevant to the concerns expressed by commenters.



transactions of plan sponsors. PBGC has been unable to find a record of any case where the filing of a reportable event notice has resulted in a default under a credit agreement. These observations suggest that the elimination of reporting waivers would not adversely affect most plan sponsors with loan agreements.

Because PBGC's current proposal provides more waivers than the 2009 proposal, commenters' concerns in this area should be lessened. And PBGC's proposed deferral of the applicability date for the final regulation should give plan sponsors time to consult with loan providers about appropriate amendments to loan agreements. However, if this concern is raised in a comment about the current proposal, PBGC requests that the commenter document the basis for the comment by providing copies of relevant loan agreements and information about the number and circumstances of plan sponsors that have experienced default or suffered other adverse consequences related to loan agreements as a result of a reportable event.

#### *Advance Reporting Threshold*

In general, reportable events must be reported to PBGC within 30 days after they occur. But section 4043(b) of ERISA requires advance reporting by a contributing sponsor for certain reportable events if a "threshold test" is met, unless the contributing sponsor or controlled group member to which an event relates is a public company. The advance reporting threshold test is based on the aggregate funding level of plans maintained by the contributing sponsor and members of the contributing sponsor's controlled group. The funding level criteria are expressed by reference to calculated values that are used to determine VRPs under section 4006 of ERISA. The reportable events regulation ties the statutory threshold test to the related provisions of the premium rates regulation.

The advance reporting threshold test in ERISA section 4043(b)(1) provides that the advance reporting requirements of section 4043(b) are to be applicable to a contributing sponsor if, as of the close of the preceding plan year —

- the aggregate unfunded vested benefits (UVBs) (as determined under ERISA section 4006(a)(3)(E)(iii)) of plans subject to title IV of ERISA which are maintained by such sponsor and members of such sponsor's controlled groups (disregarding plans with no unfunded vested benefits) exceed \$50,000,000, and
- the funded vested benefit percentage for such plans is less than 90 percent.

For this purpose, the funded vested benefit percentage means the percentage which the aggregate value of the assets of such plans bears to the aggregate vested benefits of such plans (determined in accordance with ERISA section 4006(a)(3)(E)(iii)).

PPA 2006 revised ERISA section 4006(a)(3)(E)(iii) to say that UVBs means, for a plan year, the excess (if any) of the funding target of the plan as determined under ERISA section 303(d) for the plan year by only taking into account vested benefits and by using the interest rate described in ERISA section 4006(a)(3)(E)(iv), over the fair market value of plan assets for the plan year which are held by the plan on the valuation date.

The section 303 of ERISA referred to here is a completely new section added by PPA 2006.<sup>29</sup> Under new ERISA section 303(g)(1), the value of plan assets and the funding target of a plan for a plan year are determined as of the valuation date of the plan for the plan year. Under new ERISA section 303(g)(2), the valuation date for virtually all plans subject to advance reporting under ERISA section 4043 will be the first day of the plan year. Thus, while ERISA section 4043(b)(1) refers to UVBs, assets, and vested benefits “as of the close of the preceding plan year,” in nearly all cases these quantities must, with respect to plan years beginning after

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<sup>29</sup> Section 303 of ERISA corresponds to section 430 of the Code.

2007, be calculated as of the beginning of a plan year. This creates an ambiguity with regard to the date as of which the advance reporting threshold test is to be applied.

This proposed rule, like the prior proposal, would resolve this ambiguity by requiring that the advance reporting threshold test be applied as of the valuation date for “the preceding plan year.” That is the same date as of which UVBs, assets, and vested benefits must be determined for premium purposes for the preceding plan year under the premium rates regulation as amended by PBGC’s final rule on VRPs under PPA 2006. Measuring these quantities as of that date for purposes of the advanced reporting threshold test will thus be less burdensome than requiring that separate computations be made as of the close of that year. It will also enable a plan to determine before a reportable event occurs (and before an advance report is due) whether it is subject to the advance reporting requirement.

The new proposed rule (like the prior proposal) would make a number of editorial changes to the advance reporting threshold provisions with a view to improving clarity and simplicity as well as accommodating the changes discussed above. It would also provide that the plans whose funding status is taken into account in applying the threshold test are determined as of the due date for the report, and that the “public company” status of a contributing sponsor or controlled group member to which the event relates is also determined as of that date. Although the existing regulation does not explicitly address this issue, PBGC believes it is implicit that these determinations be current. Requiring that they be made as of the due date for the report ensures currency.

### *Active Participant Reduction*

In general, a reportable active participant reduction occurs when the number of active participants is reduced below 80 percent of the number at the beginning of the year or below 75 percent of the number at the beginning of the prior year.

Several commenters remarked that a loss of more than 20 percent of active participants within a year (or more than 25 percent within two years) may result from gradual attrition and that if no waiver is applicable, constant vigilance is required to catch the moment when the threshold for reporting is crossed. Such vigilance could be burdensome for a large plan and might simply not be exercised for a small one. PBGC is sympathetic to this issue and is proposing to modify the definition of the active participant reduction event to address it.

Under the proposed change, a reportable event would occur during the plan year only when the reporting threshold was crossed either within a single 30-day period or as a result of a single cause like the discontinuance of an operation, a natural disaster, a reorganization, a mass layoff, or an early retirement incentive program. Such circumstances should be easy to spot without exercising unusual vigilance. To capture events arising from gradual attrition, the proposed regulation would require that plans measure active participant reductions at the end of each year and report if the threshold has been crossed. Fluctuations within the year would be ignored. If the active participant count at the end of the year were more than 20 percent below the count at the beginning of the year, or more than 25 percent below the count at the beginning of the prior year, reporting would be required. To provide time to count active participants as of

the end of the year, the notice date for attrition events would be extended to 120 days after year end, by which time PBGC expects many or most plans to have a final count.<sup>30</sup>

For convenience, if a plan counted participants, for purposes of the following year's premiums, as of a day other than the last day of the year for which active participant loss was being measured (such as where there was a qualifying merger or spinoff), the plan could use the active participant count on that other day as the year-end count for determining whether active participant attrition had exceeded the threshold. However, the reduction in active participants would still be considered to have occurred at the end of the measurement year.

Because this change would render unnecessary the waiver in the 2009 proposed rule for a report within one year of a prior report, that provision is absent from the current proposal. However, the changes now being proposed include the provision from 2009 that dealt with substantial cessations of operations under ERISA section 4062(e) and substantial employer withdrawals under ERISA section 4063(a). Events covered by section 4062(e) or 4063(a) must be reported to PBGC under section 4063(a). With a view to avoiding duplicative reporting, this proposal, like the 2009 proposal, would limit the active participant reduction event by excluding from consideration — in determining whether a reportable active-participant-reduction event has occurred — active participant reductions to the extent that they (1) fall within the provisions of section 4062(e) or 4063(a) and (2) are timely reported to PBGC as required under ERISA section 4063(a).

One commenter expressed satisfaction with this provision; two others raised issues about the interplay of this event and a section 4062(e) event, suggesting, for example, that there was opportunity for confusion between the 30-day notice requirement under section 4043 and the 60-

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<sup>30</sup> In most situations, a rough estimate will be sufficient to determine if the threshold has been crossed.

day notice requirement for 4062(e) events. PBGC does not see how this provision would exacerbate any such problems (and indeed believes that it would tend to ameliorate them).<sup>31</sup>

Finally, one commenter requested clarification that participants do not cease to be active if they leave employment with one member of a plan's controlled group to become employed by another controlled group member. PBGC proposes to add a provision to make this point clear.

### *Missed Contributions*

A missed contribution event occurs when a plan sponsor fails to make any required plan contribution by its due date.

PBGC proposes (as it did in 2009) to clarify the language in § 4043.25, dealing with the reportable event of failure to make required contributions. This reportable event does not apply only to contributions required by statute (including quarterly contributions under ERISA section 303(j)(3) and Code section 430(j)(3), liquidity shortfall contributions under ERISA section 303(j)(4) and Code section 430(j)(4), and contributions to amortize funding waivers under ERISA section 303(e) and Code section 430(e)). It also applies to contributions required as a condition of a funding waiver that do not fall within the statutory provisions on waiver amortization charges. The proposed revision would make this point clearer.<sup>32</sup>

The 2009 proposed rule called for eliminating all reporting waivers for missed contributions. PBGC now proposes to provide waivers for this event.

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<sup>31</sup> On August 10, 2010 (at 75 FR 48283), PBGC published a proposed rule to provide guidance on the applicability and enforcement of ERISA section 4062(e). PBGC is currently giving careful consideration to the comments on that proposed rule.

<sup>32</sup> Such "non-statutory" contributions are not taken into account under ERISA section 303(k) and Code section 430(k), dealing with liens that arise because of large missed contributions, and are therefore disregarded under § 4043.81, which implements those provisions. However, violating the conditions of a funding waiver typically means that contributions that were waived become retroactively due and unpaid and are counted for purposes of § 4043.81.

Some commenters urged PBGC to retain the grace-period waiver in the current regulation (where payment is made within 30 days after the due date). Commenters pointed out that contributions are sometimes missed through administrative error and that the availability of the grace-period waiver gives sponsors an incentive to make up missed contributions. Commenters also suggested that because new rules require a sponsor to elect to apply a funding balance towards a quarterly installment, a late installment often results from a late election due to administrative error.

PBGC is persuaded that missed contributions that are made up within 30 days do not generally pose excessive risk to the pension insurance system. Form 5500 filings provide another (albeit somewhat later) source of information about late contributions, and there is an independent reporting requirement for large cumulative missed contributions under ERISA section 303(k)(4) and Code section 430(k)(4) (implemented by § 4043.81 of the reportable events regulation). Accordingly, the current proposal would restore the grace-period waiver in the existing regulation that the 2009 proposal would have eliminated.

Commenters also urged PBGC to provide small-plan missed-quarterly reporting relief like that which has for years been provided by Technical Update, and PBGC proposes to do so. Commenters said that small plans often forgo or delay quarterly contributions to strategically manage cash flow or until valuations are completed (a practice that does not accord with the law and that PBGC does not condone). Commenters suggested that late quarterly installments often do not signal a plan sponsor's actual financial distress or a plan's imminent termination.

PBGC believes that a small-plan missed-quarterly waiver can strike an effective balance between PBGC's need for information on potentially troubled plans and the reporting challenges faced by small entities. Furthermore, since annual reports on Form 5500 are now filed

electronically, PBGC believes that contribution information on Schedule SB to Form 5500 can help round out the information submitted under the reportable events regulation. Thus, PBGC is proposing to add to the regulation a simplified small-plan missed-quarterly waiver to replace the Technical Update waivers. The codified waiver would apply to any failure to make a quarterly contribution to a plan considered small for purposes of the premium filing rules (*i.e.*, having fewer than 100 participants; the waiver under Technical Update 11-1 applies only to plans with fewer than 25 participants). Unlike the grace-period waiver, the small-plan waiver would apply only to quarterly contributions.

#### *Inability to Pay Benefits When Due*

In general, a reportable event occurs when a plan fails to make a benefit payment timely or when a plan's liquid assets fall below the level needed for paying benefits for six months.

As in 2009, PBGC proposes to clarify the large-plan waiver of the reporting requirement for inability to pay benefits when due. This waiver provision reflects PBGC's judgment that it need not require reporting of this event by larger plans that are subject to the "liquidity shortfall" rules imposing more stringent contribution requirements where liquid assets are insufficient to cover anticipated disbursement requirements. For these larger plans, (1) if the contributions required by the liquidity shortfall rules are made, the inability to pay benefits when due is resolved, and (2) if the required contributions are not made, that fact is reportable to PBGC as a failure to make required contributions. Accordingly, this provision waives reporting unless the plan is exempt from the liquidity shortfall provisions.

#### *Distribution to Substantial Owner*

Distributions to substantial owners must generally be reported if they exceed \$10,000 in a year unless the plan is fully funded for nonforfeitable benefits.



One commenter on the 2009 proposal argued that distributions to substantial owners tend to be thought of as routine and may “creep” beyond the \$10,000 reporting threshold unremarked and unreported. In response, PBGC proposes to make two changes to the regulation.

First, PBGC proposes to add to the description of this event a provision limiting the event to circumstances where the distributions to one substantial owner exceed one percent of plan assets or the distributions to all substantial owners exceed five percent of plan assets. (The one-percent provision echoes a waiver for this event that is in the existing regulation but that PBGC proposes to eliminate.) In either case, assets would be end-of-year current value of assets as required to be reported on Schedule H or I to Form 5500, and the one percent or five percent threshold would have to be exceeded for each of the two prior years. By requiring notices only for larger distributions that should be noticeable and thus not challenging to detect and report, PBGC believes that it would strike an acceptable balance between the burden of reporting and PBGC’s need for timely information about such events.

In addition, PBGC proposes to limit reporting for distributions in the form of annuities to one notice: The first notice required under the normal reporting rules would be the only notice required so long as the annuity did not increase. Once notified that an annuity was being paid to a substantial owner, PBGC would need no further notices that the annuity was continuing to be paid.

#### *Controlled Group Change*

A reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons’ ceasing to be members of the plan’s controlled group. For this purpose, the term “transaction” includes a written or unwritten legally binding agreement to transfer ownership or an actual transfer or change of ownership. However, a transaction is not reportable

if it will result solely in a reorganization involving a mere change in identity, form, or place of organization, however effected.

One commenter asked PBGC to clarify that a reportable event does not occur when there is a reorganization within an employer's controlled group in which a member ceases to exist because it is merged into another member. The example in § 4043.29(e)(3) of the current regulation indicates that such a merger is a reportable event because the disappearing member has ceased to be a member of the controlled group. After consideration, PBGC has decided to delete this example from the proposed rule to clarify that such a change solely within a controlled group is not a reportable event for purposes of the regulation.

PBGC has also from time to time received requests to clarify whether an agreement that is not to be effective unless some condition is met, such as the obtaining of some governmental approval or the occurrence of some other event, is nonetheless legally binding within the meaning of the regulation. The proposed rule would provide that whether an agreement is legally binding is to be determined without reference to any conditions in the agreement. PBGC's administration of the pension insurance system may be impaired if reporting is not required until all conditions are met. As for all reportable events, case-by-case waivers may be granted.

#### *Extraordinary Dividends*

An extraordinary dividend or stock redemption occurs when a member of a plan's controlled group declares a distribution (a dividend or stock redemption) that alone or in combination with previous distributions exceeds a level specified in the regulation. The current regulation specifies different threshold levels for cash and non-cash distributions and provides a method for aggregating cash and non-cash distributions in order to determine whether in

combination they exceed the reporting threshold. Cash distributions must be tested over both a one-year and a four-year period, non-cash distributions only over a one-year period. The cash distribution threshold is 100 percent of net income; the non-cash distribution threshold is ten percent of net assets. Distributions within a controlled group are treated the same as any other distributions.

PBGC proposes to simplify the description of this event. The simplified event would occur when a controlled group member declared a dividend or redeemed its stock and the (cash or non-cash) distribution, alone or together with other cash and non-cash distributions, exceeded 100 percent of net income for the prior fiscal year. Testing would be over a one-year period only. The new formulation would eliminate much of the computational detail that the existing regulation prescribes for determining whether a reportable event has occurred by providing that the computations be done in accordance with generally accepted accounting principles. Distributions within a controlled group would be disregarded.

Eliminating the four-year test for cash distributions would tend to make more events of this kind reportable. Disregarding intra-group distributions would have the opposite effect. The effect of using only a net income figure as a threshold is harder to assess. But PBGC expects the effects of all of these changes to be modest. And elimination of much of the detail for combining the effects of cash and non-cash distributions should reduce the administrative burden of compliance with the requirement to report such events.

#### *Transfer of Benefit Liabilities*

Section 4043(c)(12) of ERISA requires reporting to PBGC when, in any 12-month period, three percent or more of a plan's benefit liabilities are transferred to a person outside the transferor plan's controlled group or to a plan or plans maintained by a person or persons outside

the transferor plan's controlled group. Transfers of benefit liabilities are of concern to PBGC because they may reduce the transferor plan's funded percentage and because the transferee may not be as financially healthy as the transferor.

The existing reportable events regulation does not make clear whether the satisfaction of benefit liabilities through the payment of a lump sum or the purchase of an irrevocable commitment to provide an annuity constitutes a transfer of benefit liabilities for purposes of this reporting requirement. PBGC has received inquiries seeking clarification of this point and now proposes (as in 2009) to provide that such cashouts and annuitizations do not constitute transfers of benefit liabilities that must be reported under the regulation.

Section 436 of the Code and section 206(g) of ERISA (as added by PPA 2006) prohibit or limit cashouts and annuitizations by significantly underfunded plans. These provisions thus tend to prevent cashouts and annuitizations that would most seriously reduce a transferor plan's funded percentage. And since cashouts and annuitizations satisfy benefit liabilities (rather than transferring them to another plan), there is no concern about a transferee plan's financial health.

Section 4043.32(a) of the existing reportable events regulation requires post-event reporting not only for a plan that transfers benefit liabilities, but also for every other plan maintained by a member of the transferor plan's controlled group. However, existing § 4043.32(d) provides a waiver that in effect limits the post-event reporting obligation to the transferor plan. Existing § 4043.65 (dealing with advance reporting of benefit liability transfers) does not provide a similar waiver.

PBGC has concluded — as the preamble to the 2009 proposed rule indicated — that it is unnecessary to extend the advance reporting requirement for benefit liability transfers beyond the transferor plan. PBGC thus proposes to revise § 4043.32(a) to narrow the reporting requirement

to the transferor plan; to remove § 4043.32(d) (which would be redundant); and to revise § 4043.65(a) to remove the provision requiring that § 4043.32(d) be disregarded. The effect of these changes would be to leave the post-event notice requirement unchanged and to limit the advance notice requirement to the transferor plan.

### *Loan Default*

Under the existing regulation, a loan default reportable event occurs when a loan payment is more than 30 days late (10 days in the case of advance reporting), when the lender accelerates the loan, or when there is a written notice of default based on a drop in cash reserves, an unusual or catastrophic event, or the debtor's persistent failure to meet agreed-on performance levels.

PBGC believes that the significance of loan defaults is so great that reporting should not be restricted to the current list of defaults. Rather, PBGC believes that any default on a loan of \$10 million or more — even a default on a loan within a controlled group — should be reported unless a reportable event waiver applies. Accordingly, PBGC proposes to revise the definition of the loan default event so that it covers acceleration by the lender and default of any kind by the debtor.

In addition, PBGC proposes to expand this event to encompass any amendment or waiver by a lender of any loan agreement covenant for the purpose of avoiding a default. PBGC believes that a debtor can often anticipate a default situation, and that when it does, it may typically initiate discussions with its lender with a view to obtaining the lender's waiver of the covenant it expects to breach or an amendment of the loan agreement to obviate the default. In PBGC's view, such actions may reflect financial difficulty and thus, like actual defaults, pose serious challenges for the pension insurance system. These changes would apply for both post-event notices and advance notices.

PBGC believes that the treatment of loan defaults under the proposed rule is comparable to the treatment that would be experienced with a typical creditor. PBGC seeks the views of the public as to whether that belief is well-founded. PBGC further seeks public comment as to how it might better approximate such a model in its treatment of loan default events, whether there should be a materiality threshold with respect to events of default, and whether there is a category of “technical” defaults that should not be reportable events.

#### *Bankruptcy and Insolvency*

The existing regulation defines the bankruptcy reportable event to include bankruptcy under the Bankruptcy Code and any other similar judicial or nonjudicial proceeding. Notice of bankruptcies under the Bankruptcy Code can be (and routinely is) reliably obtained by other means. Accordingly, PBGC proposes to limit the reporting requirement to exclude bankruptcies under the Bankruptcy Code.

#### *Advance-Notice Extensions*

The current reportable events regulation provides extensions of the advance-notice filing deadline for three events: funding waiver requests, loan defaults, and bankruptcy/insolvency. The extension for funding waiver requests avoids the need to give one government agency (PBGC) advance notice of a filing with another government agency (IRS). The extensions for notices of loan defaults and bankruptcies or insolvencies accommodate situations where such events occur without the debtors’ advance knowledge.

In general, however, a debtor is aware well in advance that a loan default or insolvency event is going to befall it, and indeed is actively engaged in preparation for the event. PBGC thinks it not unreasonable, therefore, that a debtor subject to advance reporting should generally give the advance notice provided for in the statute. Accordingly, PBGC proposes to eliminate

reporting extensions for advance notice of loan default and insolvency events, except for events where insolvency proceedings are filed against a debtor by someone outside the plan's controlled group. In such adversarial filing cases, it is reasonable to expect that the debtor is unable to anticipate the event and thus unable to report it in advance.

PBGC is aware that there may be loan defaults that (like adversarial insolvency filings) can come as a surprise to the debtor, making compliance with the advance notice requirement impossible. However, since PBGC believes such loan defaults are very infrequent, the proposed rule does not contain an automatic extension for such situations. If inability to anticipate a loan default event were to make it impossible to comply with the advance notice requirement, the delinquent filer could seek a retroactive filing extension from PBGC based on the facts and circumstances. (An extension may similarly be requested if a filer learns of an impending event such a short time before the advance notice deadline as to make timely filing difficult.) PBGC specifically invites comment on whether this approach represents an adequate solution to any problem of surprise loan defaults that may exist.

#### *Forms and Instructions*

PBGC proposes to eliminate some of the documentation that must now be submitted with notices of two reportable events, but to require that filers submit with notices of most events some information not currently called for. Because the additional information to be submitted with notices is now typically requested by PBGC after notices are reviewed, the proposed changes would not significantly impact filers' total administrative burden.

PBGC also proposes, as it did in 2009, to make use of prescribed reportable events forms mandatory and to eliminate from the regulation the lists of information items that must be reported. PBGC anticipates that as it gains experience with the new reporting requirements and

engages in further regulatory review, it may find it appropriate to make changes in the information required to be submitted with reportable events notices. In particular, resolution of uncertainties about the operation of PPA 2006 provisions may call for changes in the data submission requirements for failures to make required contributions timely. Forms and instructions can be revised more quickly than regulations can in response to new developments or experience (and both processes are subject to public comment).

PBGC issues three reporting forms for use under the reportable events regulation. Form 10 is for post-event reporting under subpart B of the regulation; Form 10-Advance is for advance reporting under subpart C of the regulation; and Form 200 is for reporting under subpart D of the regulation. Failure to report is subject to penalties under section 4071 of ERISA.

Under the existing regulation, however, use of PBGC forms for reporting events under subparts B and C of the regulation is optional. The data items in the forms do not correspond exactly with those in the regulation, and the regulation recognizes that filers that use the forms may report different information from those that do not use the forms. PBGC believes that making use of prescribed reportable events forms mandatory would promote greater uniformity in the reporting process and attendant administrative simplicity for PBGC. Eliminating lists of information items from the regulation would mean that the information to be reported would be described in the filing instructions only (rather than in both the filing instructions and the regulation).



### *Mandatory Electronic Filing*

PBGC encourages electronic filing under the existing regulation<sup>33</sup> and now proposes to make it mandatory. This proposal is part of PBGC's ongoing implementation of the Government Paperwork Elimination Act.

Electronic filing has become the norm for PBGC's regulated community. Electronic filing is mandatory for reports under ERISA section 4010 (starting with 2005 information years), PBGC premiums (starting with 2007 plan years for all plans), and Form 5500 (starting with 2009 plan years).

PBGC does not currently have a web-based filing application for reportable events as it does for section 4010 or premium filings. However, it has become common for documents to be created electronically in a variety of digital formats (such as WPD, DOC, and XLS) and easy to create electronic images (for example, in PDF format) of documents that do not exist in electronic form. PBGC proposes that filers be permitted to e-mail filings using any one or more of a variety of electronic formats that PBGC is capable of reading as provided in the instructions on PBGC's Web site. (Forms 10 and 10-Advance do not require signatures, and PBGC already accepts imaged signatures for Form 200 filings.) The current versions of PBGC Form 10, Form 10-Advance, and Form 200 are already available in "fillable" format; in connection with the change to electronic filing, new versions of these forms will be available in "fillable" format to facilitate electronic filing.

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<sup>33</sup> The existing regulation contains a "partial electronic filing" provision under which a filing is considered timely made if certain basic information (specified in PBGC's reporting instructions) is submitted on time electronically and followed up within one or two business days (depending on the type of report) with the remaining required information. PBGC's mandatory electronic filing proposal would make the "partial electronic filing" provision anachronistic, and it would be removed.

PBGC would be able to waive electronic filing for voluminous paper documents to relieve filers of the need to scan them, pursuant to § 4043.4(d) (case-by-case waivers).

PBGC would expect its reportable events e-filing methodology to evolve as internet capabilities and standards change, consistent with resource effectiveness. Such developments would be reflected in PBGC's reportable events e-filing instructions.

PBGC seeks public comment on its proposal to require electronic filing. For example, PBGC would like to know whether there are differences commenters might see between Form 5500 filings and premium filings (which are submitted electronically) and reportable events filings that would make the latter less suited to electronic filing. PBGC would also like to know whether there are particular categories of plans or sponsors that would find electronic filing sufficiently difficult that PBGC should by regulation either exempt them from e-filing (rather than just providing case-by-case exceptions) or defer the applicability of mandatory e-filing to them (*i.e.*, provide for phase-in of the e-filing requirement, and if so, over what period of time). Finally, PBGC seeks comment on e-filing methodology, such as the convenience of submitting documents in the form of data rather than images and the usefulness of pre-filled data fields. Commenters are encouraged to describe actual rather than hypothetical circumstances and to provide comparisons between the burdens that would be associated with e-filing versus paper filing or with one e-filing method versus another. This information will help PBGC evaluate both the appropriateness of e-filing for reportable events in general and the need for special rules to accommodate specific categories of filers.

#### *Other Changes*

PBGC's 2009 proposed rule on reportable events would have added two new events to the reportable events regulation. One event would have occurred when a plan's adjusted funding

target attainment percentage (AFTAP) was found or presumed to be less than 60 percent. The other event would have occurred when a transfer of \$10 million or more was made to a plan's health benefits account under section 420(f) of the Code (as added by PPA 2006) or when plan funding thereafter deteriorated below a prescribed level. Commenters seemed generally accepting of the appropriateness of the former event but questioned the value to PBGC of the latter event. PBGC is not including either event in this proposal. AFTAPs under 60 percent trigger significant restrictions on plans that to some degree provide remediation that serves the same kind of function as the action that PBGC might take upon getting a low AFTAP notice. And PBGC has concluded that its need for health benefit account notices is not great enough to make it clearly appropriate to require them at this time.

PBGC recognizes that the changes made by PPA 2006 in the statutory provisions dealing with missed contributions — which are reportable under §§ 4043.25 and 4043.81 — affect the computation of interest on missed contributions, a circumstance that in turn affects the reporting requirements. This proposed rule includes no amendment to the reportable events regulation dealing with such issues, but PBGC is providing guidance on this subject in the filing instructions. The guidance will be revised if and when necessary to take into account as appropriate any relevant guidance from the Internal Revenue Service.

The proposed rule would clarify that if an event is subject to both post-event and advance notice requirements, the notice filed first satisfies both requirements. (In unusual circumstances, the post-event notice required in connection with a transaction may be due before the advance notice required in connection with the same transaction.)

To conform to the statute, the proposed rule would limit the applicability of the confidentiality provisions in ERISA section 4043(f) to submissions under subparts B and C of the reportable events regulation.

The proposed rule would make a number of editorial and clarifying changes to part 4043 and would add definitional cross-references, change statutory cross-references to track changes made by PPA 2006, and update language to conform to usage in PPA 2006 and regulations and reporting requirements thereunder.<sup>34</sup> Where a defined term is used in only one section of the regulation, the definition would be moved from § 4043.2 to the section where the term is used.

The proposed changes to the reportable events regulation make it unnecessary to define a number of terms at the beginning of the regulation. Accordingly, the definitions of “fair market value of the plan’s assets,” “Form 5500 due date,” “public company,” “testing date,” “ultimate parent,” “unfunded vested benefits,” “variable-rate premium,” and “vested benefits amount” would be removed from § 4043.2.

## **Summary Chart**

The following table summarizes waiver and safe harbor provisions for reportable events for which post-event reporting is required under the current regulation, the 2009 proposal, and this proposed rule. (As explained in detail above, the current proposal also provides filing relief — like the relief provided by waivers — through changes to the definitions of certain reportable events, including substantial owner distributions and active participant reductions and through the provision of filing extensions such as for active participant reductions that occur by attrition.)

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<sup>34</sup> Section 4043.62(b)(1) of the existing regulation, headed “Small plan,” provides a waiver where a plan has 500 or fewer participants. The premium payment regulation keys filing due dates to whether a plan is small (fewer than 100 participants, mid-size (100 or more but fewer than 500 participants), or large (500 or more participants). In the interest of uniformity, PBGC proposes to change § 4043.62(b)(1) to provide a waiver where a plan has fewer than 500 participants and to change the heading to read “Small and mid-size plans.”

Events with safe harbors based on company or plan financial soundness <sup>35</sup> or other factors.					
Event	Waivers under Current Regulation	Waivers under 2009 Proposal	Revised Proposal – if any of these safe harbors applies, no reporting is required		
			Company Financial Soundness Safe Harbor	Plan Financial Soundness Safe Harbor	Other Safe Harbors
<b>Extraordinary Dividend or Stock Redemption</b>	<ul style="list-style-type: none"> <li>Member distributing is de minimis (5%);<sup>36</sup></li> <li>Member distributing is non-parent foreign entity (regardless of size);</li> <li>Member distributing is foreign parent, and distribution is made solely to other controlled group members;</li> <li>At least 80% funded;</li> <li>No VRP; or</li> <li>Less than \$1 M in premium underfunding</li> </ul>	<ul style="list-style-type: none"> <li>Member distributing is de minimis (5%)</li> </ul>	<div>↑</div> <div>Company is financially sound</div> <div>↓</div>	<div>↑</div> <div>Plan is financially sound</div> <div>↓</div>	<div>↑</div> <ul style="list-style-type: none"> <li>Member involved is de minimis (10%);</li> <li>Member involved is non-parent foreign entity (regardless of size); or</li> <li>Small plan (fewer than 100 participants)</li> </ul> <div>↓</div>
<b>Change in Contributing Sponsor or Controlled Group</b>	<ul style="list-style-type: none"> <li>Member leaving is de minimis (10%);</li> <li>Member leaving is non-parent foreign entity (regardless of size);</li> <li>At least 80% funded &amp; public company;</li> <li>No VRP; or</li> <li>Less than \$1 M in premium underfunding</li> </ul>	<ul style="list-style-type: none"> <li>Member leaving is de minimis (10%)</li> </ul>			
<b>Active Participant Reduction</b>	<ul style="list-style-type: none"> <li>Small plan (fewer than 100 participants)</li> <li>At least 80% funded if not a facility closing;</li> <li>No VRP; or</li> <li>Less than \$1 M premium underfunding</li> </ul>	<ul style="list-style-type: none"> <li>Prior event reported within 1 year</li> </ul>			<ul style="list-style-type: none"> <li>Small plan (fewer than 100 participants)</li> </ul> <p><i>Note: filing extension for reductions due to gradual attrition</i></p>
<b>Transfer of Benefit Liabilities</b>	<ul style="list-style-type: none"> <li>IRC 414(l) safe harbor is used for asset transfer;</li> <li>Plan whose liabilities are all transferred;</li> <li>Both plans fully funded after transfer using 414(l) assumptions; or</li> <li>Amount transferred is less than 3% of assets</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>			<ul style="list-style-type: none"> <li>Small plan (fewer than 100 participants)</li> </ul>
<b>Distribution to Substantial Owner</b>	<ul style="list-style-type: none"> <li>At least 80% funded;</li> <li>No VRP;</li> <li>Distributions less than IRC 415 limit; or</li> <li>Distributions less than 1% of assets</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>			<ul style="list-style-type: none"> <li>No other safe harbor</li> </ul>

<sup>35</sup> Company means the plan sponsor or the U.S. parent company. The proposed financial soundness tests are set forth in § 4043.9 of the proposed regulation and described in the preamble under *Financial Soundness Safe Harbor for Plan Sponsors* and *Financial Soundness Safe Harbor for Plans*.

<sup>36</sup> De minimis is defined in § 4043.2 of both the current regulation and the proposed regulation.

Events with limited or no safe harbors			
Event	Waivers under Current Regulation	Waivers under 2009 Proposal	Safe Harbors under Revised Proposal
<b>Bankruptcy/Insolvency</b>	<ul style="list-style-type: none"> <li>Member in bankruptcy is non-parent foreign entity (regardless of size)</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>Event revised to exclude Bankruptcy Code cases.</li> <li>Member causing event is - <ul style="list-style-type: none"> <li>Not the plan sponsor and is de minimis (10%); or</li> <li>Non-parent foreign entity (regardless of size)</li> </ul> </li> </ul>
<b>Liquidation</b>	<ul style="list-style-type: none"> <li>Member liquidating is de minimis (10%) and plan survives;</li> <li>Member liquidating is non-parent foreign entity (regardless of size);</li> <li>At least 80% funded &amp; public company and plan survives; or</li> <li>No VRP or less than \$1 M in premium underfunding and plan survives</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>	<div> <div>↑</div> <ul style="list-style-type: none"> <li>Member causing event is - <ul style="list-style-type: none"> <li>Not the plan sponsor and is de minimis (10%); or</li> <li>Non-parent foreign entity (regardless of size)</li> </ul> </li> </ul> <div>↓</div> </div>
<b>Loan Default</b>	<ul style="list-style-type: none"> <li>Default cured or waived by lender within 30 days or by end of cure period;</li> <li>Member defaulting is non-parent foreign entity (regardless of size);</li> <li>At least 80% funded; or</li> <li>No VRP or less than \$1 M in premium underfunding</li> </ul>	<ul style="list-style-type: none"> <li>Default cured or waived by lender within 30 days or by end of cure period</li> </ul>	
<b>Failure to Make Required Contribution</b>	<ul style="list-style-type: none"> <li>Missed quarterlies <ul style="list-style-type: none"> <li>Plans with fewer than 25 participants if missed quarterly was not due to financial inability; simplified reporting for plans with 25-99 participants if missed quarterly was not due to financial inability (relief provided in Technical Update)</li> <li>Any sized plan, if made within 30 days of due date</li> </ul> </li> <li>Any other missed contribution, if made within 30 days of due date</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>Missed quarterlies of small plans (fewer than 100 participants)</li> <li>Any missed contribution, if made within 30 days of due date</li> </ul>
<b>Application for Funding Waiver</b>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
<b>Inability to Pay Benefits When Due</b>	<ul style="list-style-type: none"> <li>Plan with more than 100 participants (subject to liquidity shortfall rules)</li> </ul>	<ul style="list-style-type: none"> <li>Plan with more than 100 participants (subject to liquidity shortfall rules)</li> </ul>	<ul style="list-style-type: none"> <li>Plan with more than 100 participants (subject to liquidity shortfall rules)</li> </ul>



## **Other Regulations**

Several other PBGC regulations also refer to plan funding concepts using citations outmoded by PPA 2006: the regulations on Filing, Issuance, Computation of Time, and Record Retention (29 CFR part 4000); Terminology (29 CFR part 4001); Variances for Sale of Assets (29 CFR part 4204); Adjustment of Liability for a Withdrawal Subsequent to a Partial Withdrawal (29 CFR part 4206); and Mergers and Transfers Between Multiemployer Plans (29 CFR part 4231). Thus, these regulations must also be revised to be consistent with ERISA and the Code as amended by PPA 2006 and with the revised premium regulations. This proposed rule would make the necessary conforming revisions.

## **Applicability**

PBGC proposes to make the changes to the reportable events regulation in this proposed rule applicable to post-event reports for reportable events occurring on or after January 1, 2014, and to advance reports due on or after that date. Deferral of the applicability date would provide time for plans and plan sponsors to institute any necessary event monitoring programs to comply with the new rules. PBGC is also giving consideration to making the waiver and safe harbor provisions in the final regulation available (in addition to the waivers in the current regulation) during the period from the effective date of the final rule (30 days after publication in the *Federal Register*) to January 1, 2014.

## **Public Participation**

PBGC welcomes comments from the public on all matters relating to the proposed rule. In particular, PBGC seeks public comments on the following specific questions:

- (1) What are the advantages and disadvantages of the proposed safe harbor for financially sound plan sponsors?



- (2) What are commenters' experiences with commercial credit reporting companies that might be relevant to developing a reportable events safe harbor? Do credit report scores change when reportable events occur? How often or easily are changes in credit report scores provided to users and the public? Can companies obtain timely updates that allow for an accurate assessment of financial soundness at a particular time?
- (3) Does the proposal provide an appropriate way to assess financial soundness of plan sponsors? Is a commercial credit report score an appropriate basis for measuring financial strength for purposes of the safe harbor? Does the secured debt test for financial soundness include and exclude appropriate categories of debt from the test criteria? For example, should receivables financing be excluded from the test? Is the net income test too stringent or too lenient? Do the debt service and plan contribution tests include and exclude appropriate events? Are the proposed standards for the sponsor safe harbor too complex?
- (4) Regarding the number and stringency of the criteria for the financially sound company safe harbor:
  - Should there be more or fewer criteria than the five proposed in this rule? If more, what should the additional ones be? If fewer, which ones should be eliminated?
  - Are the relative stringencies of the criteria appropriate for determining company financial soundness?
  - Should alternative combinations of a subset of the five criteria be permissible?
  - Should financial soundness criteria for companies and plans be combined?
- (5) Are there standard, commonly used metrics that could be applied to determine financial soundness that do not rely on third party commercial credit reporting companies (*e.g.*, based on balance sheet or cash-flow ratios, such as current assets to current liabilities, debt to equity, or some form of debt-service to cash-flow ratio)? Would such metrics be available and appropriate for all plan sponsors? What would be the advantages or disadvantages of using such an approach? Are there other alternatives to determining financial soundness?
- (6) Should PBGC adopt other standards of creditworthiness?
- (7) For the proposed safe harbor via plans, what alternative funding percentage(s) (on a termination basis or premium basis) should be permitted, and why?
- (8) Should PBGC provide other alternative waivers? Should such alternatives be in addition to, or in place of, the proposed financial soundness safe harbors for companies and plans?
- (9) How can PBGC implement safe harbors, whether based on financial soundness or other factors, in a consistent, transparent, well-defined, and replicable or verifiable way?

In responding to the above questions, to the extent possible, commenters are requested to provide quantitative as well as qualitative support or analysis where applicable.

A public hearing has been scheduled for June 18, 2013, beginning at 2:00 p.m., in the PBGC Training Institute, Washington, DC, shortly after the close of the comment period.

Pursuant to building security procedures, visitors must arrive at 1200 K Street not more than 30 minutes before the hearing starts and present government-issued photo identification to enter the building.

PBGC requests that any person who wishes to present oral comments at the hearing file written comments on this proposed rule (see DATES and ADDRESSES above). Such persons also must submit by June 4, 2013, an outline of topics to be discussed and the amount of time to be devoted to each topic. The outline of topics to be discussed must be submitted by e-mail to [regs.comments@pbgc.gov](mailto:regs.comments@pbgc.gov) or by mail or courier to Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026. An agenda identifying the speakers will be prepared after the deadline for receiving outlines. Copies of the agenda will be available free of charge at the hearing.

## **Regulatory Procedures**

*Executive Order 12866 “Regulatory Planning and Review” and Executive Order 13563 “Improving Regulation and Regulatory Review”*

PBGC has determined, in consultation with the Office of Management and Budget, that this rule is a “significant regulatory action” under Executive Order 12866. The Office of Management and Budget has therefore reviewed this notice under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches

that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Orders 12866 and 13563 require a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts. In accordance with OMB Circular A–4, PBGC has examined the economic and policy implications of this proposed rule and has concluded that the action’s benefits justify its costs.

As discussed above, some reportable events present little or no risk to the pension insurance system — where, for example, the plan sponsor is financially sound and the risk of plan termination low. Reports of such events are unnecessary in the sense that PBGC typically reviews but takes no action on them. PBGC analyzed 2011 records to determine how many such reports it received for events to which the proposed sponsor safe harbor would apply, then reanalyzed the data to see how many unnecessary reports would have been received if the plan sponsor safe harbor in the proposed rule had been in effect (that is, excluding reports that would have been waived under the plan sponsor safe harbor test).<sup>37</sup> It found that the proportion of unnecessary filings would be much lower under the proposed regulation than under the existing regulation — 5 percent (10 filings) compared to 42 percent (79 filings). Thus, although the total number of filings may be a little higher under the proposed rule, the proportion of unnecessary reports, and the regulatory burden on financially sound sponsors and plans, would be dramatically reduced.

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<sup>37</sup> Filings that involve section 4062(e) events always result in the opening of cases and were excluded from the analysis.

Under Section 3(f)(1) of Executive Order 12866, a regulatory action is economically significant if “it is likely to result in a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” PBGC has determined that this proposed rule does not cross the \$100 million threshold for economic significance and is not otherwise economically significant.

This action is associated with retrospective review and analysis in PBGC’s Plan for Regulatory Review<sup>38</sup> issued in accordance with Executive Order 13563 on “Improving Regulation and Regulatory Review.”

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the proposed rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to the proposed amendments to the reportable events regulation, PBGC considers a small entity to be a plan with

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<sup>38</sup> See [www.pbgc.gov/documents/plan-for-regulatory-review.pdf](http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf).

fewer than 100 participants. This is the same criterion used to determine the availability of the “small plan” waiver under the proposal, and is consistent with certain requirements in Title I of ERISA<sup>39</sup> and the Internal Revenue Code,<sup>40</sup> as well as the definition of a small entity that the Department of Labor (DOL) has used for purposes of the Regulatory Flexibility Act.<sup>41</sup> Using this proposed definition, about 64 percent (16,700 of 26,100) of plans covered by Title IV of ERISA in 2010 were small plans.<sup>42</sup>

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the proposal on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR § 121.201) pursuant to the Small Business Act. PBGC therefore requests comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments to the reportable events regulation.

On the basis of its proposed definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply. This certification is based on the fact that the reportable

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<sup>39</sup> See, e.g., ERISA section 104(a)(2), which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

<sup>40</sup> See, e.g., Code section 430(g)(2)(B), which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

<sup>41</sup> See, e.g., DOL’s final rule on Prohibited Transaction Exemption Procedures, 76 Fed. Reg. 66,637, 66,644 (Oct. 27, 2011).

<sup>42</sup> See PBGC 2010 pension insurance data table S-31, <http://www.pbgc.gov/Documents/pension-insurance-data-tables-2010.pdf>.

events regulation requires only the filing of one-time notices on the occurrence of unusual events that affect only certain plans and that the economic impact of filing is not significant. The average burden of submitting a notice — based on the estimates discussed under *Paperwork Reduction Act*, below — is less than 5½ hours and \$800 (virtually the same as under the current regulation). PBGC invites public comment on this burden estimate.

#### *Paperwork Reduction Act*

PBGC is submitting the information requirements under this proposed rule to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. There are two information collections under the reportable events regulation, approved under OMB control number 1212-0013 (covering subparts B and C) and OMB control number 1212-0041 (covering subpart D), both of which expire March 31, 2015. Copies of PBGC's requests may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202-326-4040.

PBGC is proposing the following changes to these information requirements:

- PBGC's experience is that in order to assess the significance of virtually every post-event filing for a missed contribution, inability to pay benefits, loan default, liquidation, or insolvency, it must obtain from the filer certain actuarial, financial, and controlled group information. Filers are currently required to submit some of this information for some events, but PBGC wants to make its information collection for all these events more uniform. Accordingly, PBGC proposes to require that every post-event filing for one of these events include these items (except that financial information is unnecessary for reports of insolvency because PBGC can typically obtain most of the information from court records). Actuarial information would no longer have to be submitted with post-event notices of other events. (1) The actuarial information required would be a copy of the most recent actuarial valuation report for the plan, a statement of subsequent material changes, and the most recent month-end market value of plan assets. (2) The financial information required would be copies of audited financial statements for the most recent fiscal year. (If audited statements were not immediately available, copies of unaudited financial statements (if available) or tax returns would be required, to be followed up with required financial statements when available.) (3) The controlled group information required would be tailored to the event being reported and would generally include identifying information for each plan maintained by any member of the controlled group,

a description of the controlled group with members' names, and the status of members (for example, liquidating or in bankruptcy).

- Similarly, PBGC has found that it needs the same actuarial, financial, and controlled group information for advance-notice filings. For notices of funding waiver requests, the information can typically be gleaned from the copy of the request that accompanies the reportable event notice. And financial information is unnecessary for reports of insolvency because PBGC can typically obtain most of the information from court records. With these exceptions, PBGC proposes to require that every advance notice filing include these items.
- Controlled group changes and benefit liability transfers involve both an “old” controlled group and a “new” controlled group. PBGC already requires submission of controlled group information with notices of controlled group changes, and now proposes to do the same for benefit liability transfers.
- Because extraordinary distributions raise questions about controlled group finances, PBGC proposes to require submission of financial information with notices of events of this type.
- Inability to pay benefits and liquidation both raise the specter of imminent sponsor shutdown and plan termination. Accordingly, for notices of these two events (including advance notices of liquidation events), PBGC proposes to require submission of copies of the most recent plan documents and IRS qualification letter, the date or expected date of shutdown, and the identity of the plan actuary if different from the actuary reported on the most recent Form 5500 Schedule SB. Plan documents would no longer be required with notices for other events.
- PBGC proposes to require e-mail addresses for plan administrators, sponsors, and designated contact persons.
- PBGC proposes to require that both post-event and advance report filings state explicitly the date of the event or the actual or anticipated effective date of the event (as applicable). This requirement will avoid the potential for confusion or ambiguity in the description of the event regarding this date.
- PBGC has found that it often does not need the actuarial valuation report that must currently be included with notice of a substantial owner distribution and thus proposes to eliminate that requirement. However, PBGC proposes to add a requirement that notices of this event give the reason for the distribution to help PBGC analyze its significance.
- For both post-event and advance notices of loan defaults, PBGC proposes to require that any cross-defaults or anticipated cross-defaults be described.
- PBGC has found that some filers that should file Form 200 under § 4043.81 of the reportable events regulation (missed contributions totaling over \$1 million) file only

Form 10 under § 4043.25 (missed contributions of any amount). This has led to delays in enforcing liens under ERISA section 302(f) and Code section 412(n) (corresponding to ERISA section 303(k) and Code section 430(k) as amended by PPA 2006). To address this issue, PBGC proposes that Form 10 filings for missed contributions include the amount and date of all missed contributions since the most recent Schedule SB.

- PBGC proposes to eliminate Form 200 information submission requirements for documents that PBGC typically can now obtain timely on its own and to add new information submission requirements to help it analyze the seriousness of the plan's status and perfect statutory liens triggered by large missed contributions. Documentation to be eliminated would be copies of Form 5500 Schedule SB, SEC filings, and documents connected with insolvency, liquidation, receivership, and similar proceedings. New information to be required would be a statement of material changes in liabilities since the most recent actuarial valuation report, most recent month-end market value of plan assets, description of each controlled group member's status (for example, liquidating or in bankruptcy), information about all controlled group real property, and identity of controlled group head offices.
- PBGC Form 10 currently requires for the bankruptcy/insolvency event that the bankruptcy petition and docket (or similar documents) be submitted. Form 10-Advance requires that all documents filed in the relevant proceeding be submitted. Both forms require that the last date for filing claims be reported if known. PBGC proposes to replace these requirements with a requirement that filers simply identify the court where the insolvency proceeding was filed or will be filed and the docket number of the filing (if known).

PBGC needs the information in reportable events filings under subparts B and C of part 4043 (Forms 10 and 10-Advance) to determine whether it should terminate plans that experience events that indicate plan or contributing sponsor financial problems. PBGC estimates that it will receive such filings from about 1,085 respondents each year and that the total annual burden of the collection of information will be about 5,744 hours and \$857,195. This represents a burden comparable to that under the existing regulation, as the following table shows:

<b>Annual burden:</b>	<b>Under existing regulation:</b>	<b>Under proposed rule:</b>
Number of responses	1,026	1,085
Hour burden	5,400 hours	5,744 hours
Dollar burden	\$821,826	\$857,195



As discussed above, however, the proposal is designed to reduce burden dramatically on financially sound plans and sponsors (which present a low degree of risk); thus, burden under the proposed rule would be substantially associated with higher-risk events, which are much more likely to deserve PBGC's attention. PBGC separately estimated the average burden changes for low-risk and high-risk entities. The burden for low-risk sponsors would go down from 417 hours and \$121,725 to zero. The burden for high-risk sponsors would go up by approximately 760 hours and \$157,100.

<b>Low-risk</b>	<b>Volume</b>	<b>Hours</b>	<b>Cost</b>
Current	144	417	\$121,725
Proposed	0	0	\$0
Change	(144)	(417)	\$(121,725)

<b>High-risk</b>	<b>Volume</b>	<b>Hours</b>	<b>Cost</b>
Current	882	4,983	\$700,101
Proposed	1,085	5,744	\$857,195
Change	203	761	\$157,094

PBGC needs the information in missed contribution filings under subpart D of part 4043 (Form 200) to determine the amounts of statutory liens arising under ERISA section 303(k) and Code section 430(k) and to evaluate the funding status of plans with respect to which such liens arise and the financial condition of the persons responsible for their funding. PBGC estimates that it will receive such filings from about 136 respondents each year and that the total annual burden of the collection of information will be about 816 hours and \$125,000.<sup>43</sup>

Comments on the paperwork provisions under this proposed rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention:

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<sup>43</sup> In comparison, PBGC's most recent annual burden estimate for this information collection was 110 responses, 670 hours, and \$102,000.

Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395-6974. Although comments may be submitted through [insert date 60 days after publication in the **Federal Register**], the Office of Management and Budget requests that comments be received on or before [insert date 30 days after publication in the **Federal Register**] to ensure their consideration. Comments may address (among other things) —

- Whether each proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
- The accuracy of PBGC's estimate of the burden of each proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of each collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

## **List of Subjects**

### *29 CFR Part 4000*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

### *29 CFR Part 4001*

Employee benefit plans, Pension insurance.

### *29 CFR Part 4043*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

### *29 CFR Part 4204*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

### *29 CFR Part 4206*

Employee benefit plans, Pension insurance.

*29 CFR Part 4231*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

- For the reasons given above, PBGC proposes to amend 29 CFR parts 4000, 4001, 4043, 4204, 4206, and 4231 as follows.

**PART 4000—FILING, ISSUANCE, COMPUTATION OF TIME, AND RECORD RETENTION**

- 1. The authority citation for part 4000 is revised to read as follows:

**Authority:** 29 U.S.C. 1083(k), 1302(b)(3).

- 2. In § 4000.3, new paragraph (b)(3) is added to read as follows:

**§ 4000.3 What methods of filing may I use?**

\* \* \* \* \*

(b) \* \* \*

(3) You must file notices under part 4043 of this chapter electronically in accordance with the instructions on PBGC’s Web site, except as otherwise provided by PBGC.

\* \* \* \* \*

- 3. In § 4000.53, paragraphs (c) and (d) are amended by removing the words “section 302(f)(4), section 307(e), or” where they occur in each paragraph and adding in their place the words “section 101(f), section 303(k)(4), or”.

**PART 4001 — TERMINOLOGY**

- 4. The authority citation for part 4001 continues to read as follows:

**Authority:** 29 U.S.C. 1301, 1302(b)(3).

- 5. In § 4001.2:

a. The definition of “controlled group” is amended by removing the words “section 412(c)(11)(B) of the Code or section 302(c)(11)(B) of ERISA” and adding in their place the words “section 412(b)(2) of the Code or section 302(b)(2) of ERISA”.

b. The definition of “funding standard account” is amended by removing the words “section 302(b) of ERISA or section 412(b) of the Code” and adding in their place the words “section 304(b) of ERISA or section 431(b) of the Code”.

c. The definition of “substantial owner” is amended by removing the words “section 4022(b)(5)(A)” and adding in their place the words “section 4021(d)”.

■ 6. Part 4043 is revised to read as follows:

## **PART 4043—REPORTABLE EVENTS AND CERTAIN OTHER NOTIFICATION REQUIREMENTS**

### **Subpart A — General Provisions**

Sec.

4043.1 Purpose and scope.

4043.2 Definitions.

4043.3 Requirement of notice.

4043.4 Waivers and extensions.

4043.5 How and where to file.

4043.6 Date of filing.

4043.7 Computation of time.

4043.8 Confidentiality.

4043.9 Financial soundness.

### **Subpart B — Post-Event Notice of Reportable Events**

4043.20 Post-event filing obligation.

4043.21 Tax disqualification and Title I noncompliance.

4043.22 Amendment decreasing benefits payable.

4043.23 Active participant reduction.

4043.24 Termination or partial termination.

4043.25 Failure to make required minimum funding payment.

4043.26 Inability to pay benefits when due.

4043.27 Distribution to a substantial owner.

4043.28 Plan merger, consolidation, or transfer.

4043.29 Change in contributing sponsor or controlled group.

4043.30 Liquidation.

- 4043.31 Extraordinary dividend or stock redemption.
- 4043.32 Transfer of benefit liabilities.
- 4043.33 Application for minimum funding waiver.
- 4043.34 Loan default.
- 4043.35 Insolvency or similar settlement.

### **Subpart C — Advance Notice of Reportable Events**

- 4043.61 Advance reporting filing obligation.
- 4043.62 Change in contributing sponsor or controlled group.
- 4043.63 Liquidation.
- 4043.64 Extraordinary dividend or stock redemption.
- 4043.65 Transfer of benefit liabilities.
- 4043.66 Application for minimum funding waiver.
- 4043.67 Loan default.
- 4043.68 Insolvency or similar settlement.

### **Subpart D — Notice of Failure to Make Required Contributions**

- 4043.81 PBGC Form 200, notice of failure to make required contributions; supplementary information.

**Authority:** 29 U.S.C. 1082(f), 1302(b)(3), 1343.

### **Subpart A — General Provisions**

#### **§ 4043.1 Purpose and scope.**

This part prescribes the requirements for notifying PBGC of a reportable event under section 4043 of ERISA or of a failure to make certain required contributions under section 303(k)(4) of ERISA or section 430(k)(4) of the Code. Subpart A contains definitions and general rules. Subpart B contains rules for post-event notice of a reportable event. Subpart C contains rules for advance notice of a reportable event. Subpart D contains rules for notifying PBGC of a failure to make certain required contributions.

#### **§ 4043.2 Definitions.**

The following terms are defined in § 4001.2 of this chapter: benefit liabilities, Code, contributing sponsor, controlled group, ERISA, fair market value, irrevocable commitment,

multiemployer plan, PBGC, person, plan, plan administrator, plan year, single-employer plan, and substantial owner.

In addition, for purposes of this part:

*De minimis 10-percent segment* means, in connection with a plan's controlled group, one or more entities that in the aggregate have for a fiscal year —

- (1) Revenue not exceeding 10 percent of the controlled group's revenue;
- (2) Annual operating income not exceeding the greater of —
  - (i) 10 percent of the controlled group's annual operating income; or
  - (ii) \$5 million; and
- (3) Net tangible assets at the end of the fiscal year(s) not exceeding the greater of —
  - (i) 10 percent of the controlled group's net tangible assets at the end of the fiscal year(s);

or

- (ii) \$5 million.

*De minimis 5-percent segment* has the same meaning as *de minimis 10-percent segment*, except that "5 percent" is substituted for "10 percent" each time it appears.

*Event year* means the plan year in which a reportable event occurs.

*Financially sound* has the meaning described in § 4043.9.

*Foreign entity* means a member of a controlled group that —

- (1) Is not a contributing sponsor of a plan;
- (2) Is not organized under the laws of (or, if an individual, is not a domiciliary of) any state (as defined in section 3(10) of ERISA); and
- (3) For the fiscal year that includes the date the reportable event occurs, meets one of the following tests —

- (i) Is not required to file any United States federal income tax form;
- (ii) Has no income reportable on any United States federal income tax form other than passive income not exceeding \$1,000; or
- (iii) Does not own substantial assets in the United States (disregarding stock of a member of the plan's controlled group) and is not required to file any quarterly United States tax returns for employee withholding.

*Foreign parent* means a foreign entity that is a direct or indirect parent of a person that is a contributing sponsor of a plan.

*Notice date* means the deadline (including extensions) for filing notice of a reportable event with PBGC.

*Participant* means a participant as defined in § 4006.2 of this chapter.

*U.S. entity* means an entity subject to the personal jurisdiction of the U.S. district court.

### **§ 4043.3 Requirement of notice.**

#### *(a) Obligation to file.*

(1) *In general.* Each person that is required to file a notice under this part, or a duly authorized representative, must submit the information required under this part by the time specified in § 4043.20 (for post-event notice), § 4043.61 (for advance notice), or § 4043.81 (for Form 200 filings). Any information filed with PBGC in connection with another matter may be incorporated by reference. If an event is subject to both post-event and advance notice requirements, the notice filed first satisfies both filing requirements.

(2) *Multiple plans.* If a reportable event occurs for more than one plan, the filing obligation with respect to each plan is independent of the filing obligation with respect to any other plan.

(3) *Optional consolidated filing.* A filing of a notice with respect to a reportable event by any person required to file will be deemed to be a filing by all persons required to give PBGC notice of the event under this part. If notices are required for two or more events, the notices may be combined in one filing.

(b) *Contents of reportable event notice.* A person required to file a reportable event notice under subpart B or C of this part must file, by the notice date, the form specified by PBGC for that purpose, with the information specified in PBGC's reportable events instructions.

(c) *Reportable event forms and instructions.* PBGC will issue reportable events forms and instructions and make them available on its Web site ([www.pbgc.gov](http://www.pbgc.gov)).

(d) *Requests for additional information.* PBGC may, in any case, require the submission of additional relevant information not specified in its forms and instructions. Any such information must be submitted for subpart B of this part within 30 days, and for subpart C or D of this part within 7 days, after the date of a written request by PBGC, or within a different time period specified therein. PBGC may in its discretion shorten the time period where it determines that the interests of PBGC or participants may be prejudiced by a delay in receipt of the information.

(e) *Effect of failure to file.* If a notice (or any other information required under this part) is not provided within the specified time limit, PBGC may assess against each person required to provide the notice a separate penalty under section 4071 of ERISA. PBGC may pursue any other equitable or legal remedies available to it under the law.

#### **§ 4043.4 Waivers and extensions.**

(a) *Waivers and extensions — in general.* PBGC may extend any deadline or waive any other requirement under this part where it finds convincing evidence that the waiver or extension



is appropriate under the circumstances. Any waiver or extension may be subject to conditions. A request for a waiver or extension must be filed with PBGC in writing (which may be in electronic form) and must state the facts and circumstances on which the request is based.

(b) *Waivers and extensions — specific events.* For some reportable events, automatic waivers from reporting and information requirements and extensions of time are provided in subparts B and C of this part. If an occurrence constitutes two or more reportable events, reporting requirements for each event are determined independently. For example, reporting is automatically waived for an occurrence that constitutes a reportable event under more than one section only if the requirements for an automatic waiver under each section are satisfied.

(c) *Multiemployer plans.* The requirements of section 4043 of ERISA are waived with respect to multiemployer plans.

(d) *Terminating plans.* No notice is required from the plan administrator or contributing sponsor of a plan if the notice date is on or after the date on which —

(1) All of the plan's assets (other than any excess assets) are distributed pursuant to a termination under part 4041 of this chapter; or

(2) A trustee is appointed for the plan under section 4042(c) of ERISA.

#### **§ 4043.5 How and where to file.**

Reportable event notices required under this part must be filed electronically using the forms and in accordance with the instructions promulgated by PBGC, which are posted on PBGC's Web site. Filing guidance is provided by the instructions and by subpart A of part 4000 of this chapter.

#### **§ 4043.6 Date of filing.**

(a) *Post-event notice filings.* PBGC applies the rules in subpart C of part 4000 of this chapter to determine the date that a submission under subpart B of this part was filed with PBGC.

(b) *Advance notice and Form 200 filings.* Information filed under subpart C or D of this part is treated as filed on the date it is received by PBGC. Subpart C of part 4000 of this chapter provides rules for determining when PBGC receives a submission.

#### **§ 4043.7 Computation of time.**

PBGC applies the rules in subpart D of part 4000 of this chapter to compute any time period under this part.

#### **§ 4043.8 Confidentiality.**

In accordance with section 4043(f) of ERISA and § 4901.21(a)(3) of this chapter, any information or documentary material that is not publicly available and is submitted to PBGC pursuant to subpart B or C of this part will not be made public, except as may be relevant to any administrative or judicial action or proceeding or for disclosures to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

#### **§ 4043.9 Financial soundness.**

(a) *In general.* The term “financially sound” is defined in paragraph (b) of this section for an entity that is a plan sponsor or member of a plan sponsor’s controlled group and in paragraph (c) of this section for a plan.

(b) *Financially sound sponsor or controlled group member.* For purposes of this part, an entity that is a plan sponsor or member of a plan sponsor’s controlled group is “financially sound” as of any date (the determination date) if on the determination date it has adequate

capacity to meet its obligations in full and on time as evidenced by its satisfaction of all of the five criteria described in paragraphs (b)(1) through (b)(5) of this section.

(1) The entity is scored by a commercial credit reporting company that is commonly used in the business community, and the score indicates a low likelihood that the entity will default on its obligations.

(2) The entity has no secured debt, disregarding leases or debt incurred to acquire or improve property and secured only by that property.

(3) For the most recent two fiscal years, the entity has positive net income under generally accepted accounting principles (GAAP) or International Financial Reporting Standards (IFRS). For purposes of this provision, net income of a tax-exempt entity is the excess of total revenue over total expenses as required to be reported on Internal Revenue Service Form 990.

(4) For the two-year period ending on the determination date, no event described in § 4043.34(a)(1) or (2) (dealing with a default on loan with an outstanding balance of \$10 million or more) has occurred with respect to any loan to the entity, regardless of whether reporting was waived under § 4043.34(c).

(5) For the two-year period ending on the determination date, the entity has not failed to make when due any contribution described in § 4043.25(a)(1) or (2) (dealing with failure to make required minimum funding payments), unless reporting is waived under § 4043.25(c) for failure to make the contribution.

(c) *Financially sound plan.* For purposes of this part, “financially sound” means, with respect to a plan for a plan year, that the plan meets the requirements of either paragraph (c)(1) or paragraph (c)(2) of this section.

(1) A plan meets the requirements of this paragraph (c)(1) if, as of the last day of the prior plan year, the plan had no unfunded benefit liabilities (within the meaning of section 4062(b)(1)(A) of ERISA) as determined in accordance with §§ 4044.51 through 4044.57 of this chapter (dealing with valuation of benefits and assets in trustee terminating plans) and § 4010.8(d)(1)(ii) of this chapter.

(2) A plan meets the requirements of this paragraph (c)(2) if for the prior plan year, the ratio of the value of the plan's assets as determined for premium purposes in accordance with part 4006 of this chapter to the amount of the plan's premium funding target as so determined was not less than 120 percent.

#### **Subpart B — Post-Event Notice of Reportable Events**

##### **§ 4043.20 Post-event filing obligation.**

(a) *In general.* The plan administrator and each contributing sponsor of a plan for which a reportable event under this subpart has occurred are required to notify PBGC within 30 days after that person knows or has reason to know that the reportable event has occurred, unless a waiver or extension applies. If there is a change in plan administrator or contributing sponsor, the reporting obligation applies to the person who is the plan administrator or contributing sponsor of the plan on the 30th day after the reportable event occurs.

(b) *Extension for certain events.* For the events described in §§ 4043.23, 4043.27, 4043.29, 4043.31, and 4043.32, if the plan's premium due date for the plan year preceding the event year was determined under § 4007.11(a)(1) (dealing with small plans) or § 4007.11(c) (dealing with new and newly covered plans) of this chapter, the notice date is extended until the last day of the seventeenth full calendar month that began on or after the first day of such preceding plan year (the effective date, in the case of a new plan).

**§ 4043.21 Tax disqualification and Title I noncompliance.**

(a) *Reportable event.* A reportable event occurs when the Secretary of the Treasury issues notice that a plan has ceased to be a plan described in section 4021(a)(2) of ERISA, or when the Secretary of Labor determines that a plan is not in compliance with title I of ERISA.

(b) *Waiver.* Notice is waived for this event.

**§ 4043.22 Amendment decreasing benefits payable.**

(a) *Reportable event.* A reportable event occurs when an amendment to a plan is adopted under which the retirement benefit payable from employer contributions with respect to any participant may be decreased.

(b) *Waiver.* Notice is waived for this event.

**§ 4043.23 Active participant reduction.**

(a) *Reportable event.* A reportable event occurs:

(1) *Single-cause event.* When the reductions in the number of active participants under a plan due to a single cause — such as a reorganization, the discontinuance of an operation, a natural disaster, a mass layoff, or an early retirement incentive program — are more than 20 percent of the number of active participants at the beginning of the plan year or more than 25 percent of the number of active participants at the beginning of the previous plan year.

(2) *Short-period event.* When the reductions in the number of active participants under a plan over a short period (disregarding reductions reported under paragraph (a)(1) of this section) are more than 20 percent of the number of active participants at the beginning of the plan year, or more than 25 percent of the number of active participants at the beginning of the previous plan year. For this purpose, a short period is a period of 30 days or less that does not include any part of a prior short period for which an active participant reduction is reported under this section.

(3) *Attrition event.* On the last day of a plan year if the number of active participants under a plan are reduced by more than 20 percent of the number of active participants at the beginning of the plan year, or by more than 25 percent of the number of active participants at the beginning of the previous plan year. The reduction may be measured by using the number of active participants on either the last day of the plan year or the participant count date (as defined in § 4006.2 of this chapter) for the next plan year, but in either case is considered to occur on the last day of the plan year.

(b) *Determination rules.*

(1) *Determination dates.* The number of active participants at the beginning of a plan year may be determined by using the number of active participants at the end of the previous plan year.

(2) *Active participant.* “Active participant” means a participant who —

- (i) Is receiving compensation for work performed;
- (ii) Is on paid or unpaid leave granted for a reason other than a layoff;
- (iii) Is laid off from work for a period of time that has lasted less than 30 days; or
- (iv) Is absent from work due to a recurring reduction in employment that occurs at least annually.

(3) *Employment relationship.* The employment relationship referred to in this paragraph (b) is between the participant and all members of the plan’s controlled group.

(c) *Reductions due to cessations and withdrawals.* For purposes of paragraphs (a)(1) and (a)(2) of this section, a reduction in the number of active participants is to be disregarded to the extent that it —

- (1) Is attributable to an event described in ERISA section 4062(e) or 4063(a), and

(2) Is timely reported to PBGC under ERISA section 4063(a).

(d) *Waivers.*

(1) *Current-year small plan.* Notice under this section is waived if the plan had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *Financial soundness.* Notice under this section is waived if —

(i) For each contributing sponsor of the plan, either the sponsor or the sponsor's highest level controlled group parent that is a U.S. entity is financially sound when the event occurs, or

(ii) The plan is financially sound for the plan year in which the event occurs.

(e) *Extension — attrition event.* For an event described in paragraph (a)(3) of this section, the notice date is extended until 120 days after the end of the event year.

#### **§ 4043.24 Termination or partial termination.**

(a) *Reportable event.* A reportable event occurs when the Secretary of the Treasury determines that there has been a termination or partial termination of a plan within the meaning of section 411(d)(3) of the Code.

(b) *Waiver.* Notice is waived for this event.

#### **§ 4043.25 Failure to make required minimum funding payment.**

(a) *Reportable event.* A reportable event occurs when —

(1) A contribution required under sections 302 and 303 of ERISA or sections 412 and 430 of the Code is not made by the due date for the payment under ERISA section 303(j) or Code section 430(j), or

(2) Any other contribution required as a condition of a funding waiver is not made when due.

(b) *Alternative method of compliance — Form 200 filed.* If, with respect to the same failure, a filing is made in accordance with § 4043.81, that filing satisfies the requirements of this section.

(c) *Waivers.*

(1) *Current-year small plan.* Notice under this section is waived with respect to a failure to make a required quarterly contribution under section 303(j)(3) of ERISA or section 430(j)(3) of the Code if the plan had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *30-day grace period.* Notice under this section is waived if the missed contribution is made by the 30th day after its due date.

#### **§ 4043.26 Inability to pay benefits when due.**

(a) *Reportable event.* A reportable event occurs when a plan is currently unable or projected to be unable to pay benefits.

(1) *Current inability.* A plan is currently unable to pay benefits if it fails to provide any participant or beneficiary the full benefits to which the person is entitled under the terms of the plan, at the time the benefit is due and in the form in which it is due. A plan is not treated as being currently unable to pay benefits if its failure to pay is caused solely by —

(i) A limitation under section 436 of the Code and section 206(g) of ERISA (dealing with funding-based limits on benefits and benefit accruals under single-employer plans), or

(ii) The need to verify a person's eligibility for benefits; the inability to locate a person; or any other administrative delay if the delay is for less than the shorter of two months or two full benefit payment periods.



(2) *Projected inability.* A plan is projected to be unable to pay benefits when, as of the last day of any quarter of a plan year, the plan's "liquid assets" are less than two times the amount of the "disbursements from the plan" for such quarter. "Liquid assets" and "disbursements from the plan" have the same meaning as under section 303(j)(4)(E) of ERISA and section 430(j)(4)(E) of the Code.

(b) *Waiver — plans subject to liquidity shortfall rules.* Notice under this section is waived unless the reportable event occurs during a plan year for which the plan is exempt from the liquidity shortfall rules in section 303(j)(4) of ERISA and section 430(j)(4) of the Code because it is described in section 303(g)(2)(B) of ERISA and section 430(g)(2)(B) of the Code.

**§ 4043.27 Distribution to a substantial owner.**

- (a) *Reportable event.* A reportable event occurs for a plan when —
- (1) There is a distribution to a substantial owner of a contributing sponsor of the plan;
  - (2) The total of all distributions made to the substantial owner within the one-year period ending with the date of such distribution exceeds \$10,000;
  - (3) The distribution is not made by reason of the substantial owner's death;
  - (4) Immediately after the distribution, the plan has nonforfeitable benefits (as provided in § 4022.5 of this chapter) that are not funded; and
  - (5) Either —
    - (i) The sum of the values of all distributions to any one substantial owner within the one-year period ending with the date of the distribution is more than one percent of the end-of-year total amount of the plan's assets (as required to be reported on Schedule H or Schedule I to Form 5500) for each of the two plan years immediately preceding the event year, or

(ii) The sum of the values of all distributions to all substantial owners within the one-year period ending with the date of the distribution is more than five percent of the end-of-year total amount of the plan's assets (as required to be reported on Schedule H or Schedule I to Form 5500) for each of the two plan years immediately preceding the event year.

(b) *Determination rules.*

(1) *Valuation of distribution.* The value of a distribution under this section is the sum of —

- (i) The cash amounts actually received by the substantial owner;
- (ii) The purchase price of any irrevocable commitment; and
- (iii) The fair market value of any other assets distributed, determined as of the date of distribution to the substantial owner.

(2) *Date of substantial owner distribution.* The date of distribution to a substantial owner of a cash distribution is the date it is received by the substantial owner. The date of distribution to a substantial owner of an irrevocable commitment is the date on which the obligation to provide benefits passes from the plan to the insurer. The date of any other distribution to a substantial owner is the date when the plan relinquishes control over the assets transferred directly or indirectly to the substantial owner.

(3) *Determination date.* The determination of whether a participant is (or has been in the preceding 60 months) a substantial owner is made on the date when there has been a distribution that would be reportable under this section if made to a substantial owner.

(c) *Alternative method of compliance — non-increasing annuity.* In the case of a non-increasing annuity for a substantial owner, a filing that satisfies the requirements of this section with respect to any payment under the annuity and that discloses the period, periodic amount,

and duration of the annuity satisfies the requirements of this section with respect to all subsequent payments under the annuity.

(d) *Waivers — financial soundness.* Notice under this section is waived if —

(1) For each contributing sponsor of the plan, either the sponsor or the sponsor's highest level controlled group parent that is a U.S. entity is financially sound when the event occurs, or

(2) The plan is financially sound for the plan year in which the event occurs.

**§ 4043.28 Plan merger, consolidation or transfer.**

(a) *Reportable event.* A reportable event occurs when a plan merges, consolidates, or transfers its assets or liabilities under section 208 of ERISA or section 414(l) of the Code.

(b) *Waiver.* Notice under this section is waived for this event. However, notice may be required under § 4043.29 (for a controlled group change) or § 4043.32 (for a transfer of benefit liabilities).

**§ 4043.29 Change in contributing sponsor or controlled group.**

(a) *Reportable event.* A reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group. For purposes of this section, the term "transaction" includes, but is not limited to, a legally binding agreement, whether or not written, to transfer ownership, an actual transfer of ownership, and an actual change in ownership that occurs as a matter of law or through the exercise or lapse of pre-existing rights. Whether an agreement is legally binding is to be determined without regard to any conditions in the agreement. A transaction is not reportable if it will result solely in a reorganization involving a mere change in identity, form, or place of organization, however effected.

(b) *Waivers.*

(1) *De minimis 10-percent segment.* Notice under this section is waived if the person or persons that will cease to be members of the plan's controlled group represent a *de minimis* 10-percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity.* Notice under this section is waived if each person that will cease to be a member of the plan's controlled group is a foreign entity other than a foreign parent.

(3) *Current-year small plan.* Notice under this section is waived if the plan had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(4) *Financial soundness.* Notice under this section is waived if —

(i) For each post-event contributing sponsor of the plan, either the sponsor or the sponsor's highest level controlled group parent that is a U.S. entity is financially sound when the event occurs, or

(ii) The plan is financially sound for the plan year in which the event occurs.

(c) *Examples.* The following examples assume that no waiver applies.

(1) *Controlled group breakup.* Plan A's controlled group consists of Company A (its contributing sponsor), Company B (which maintains Plan B), and Company C. As a result of a transaction, the controlled group will break into two separate controlled groups — one segment consisting of Company A and the other segment consisting of Companies B and C. Both Company A (Plan A's contributing sponsor) and the plan administrator of Plan A are required to report that Companies B and C will leave Plan A's controlled group. Company B (Plan B's contributing sponsor) and the plan administrator of Plan B are required to report that Company A

will leave Plan B's controlled group. Company C is not required to report because it is not a contributing sponsor or a plan administrator.

(2) *Change in contributing sponsor.* Plan Q is maintained by Company Q. Company Q enters into a binding contract to sell a portion of its assets and to transfer employees participating in Plan Q, along with Plan Q, to Company R, which is not a member of Company Q's controlled group. There will be no change in the structure of Company Q's controlled group. On the effective date of the sale, Company R will become the contributing sponsor of Plan Q. A reportable event occurs on the date of the transaction (*i.e.*, the binding contract), because as a result of the transaction, Company Q (and any other member of its controlled group) will cease to be a member of Plan Q's controlled group. If, on the 30th day after Company Q and Company R enter into the binding contract, the change in the contributing sponsor has not yet become effective, Company Q has the reporting obligation. If the change in the contributing sponsor has become effective by the 30th day, Company R has the reporting obligation.

#### **§ 4043.30 Liquidation.**

(a) *Reportable event.* A reportable event occurs for a plan when a member of the plan's controlled group —

(1) Is involved in any transaction to implement its complete liquidation (including liquidation into another controlled group member);

(2) Institutes or has instituted against it a proceeding to be dissolved or is dissolved, whichever occurs first; or

(3) Liquidates in a case under the Bankruptcy Code, or under any similar law.

(b) *Waivers.*

(1) *De minimis 10-percent segment.* Notice under this section is waived if the person or persons that liquidate do not include any contributing sponsor of the plan and represent a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity.* Notice under this section is waived if each person that liquidates is a foreign entity other than a foreign parent.

**§ 4043.31 Extraordinary dividend or stock redemption.**

(a) *Reportable event.* A reportable event occurs for a plan when any member of the plan's controlled group declares a dividend or redeems its own stock and the amount or net value of the distribution, when combined with other such distributions during the same fiscal year of the person, exceeds the person's net income before after-tax gain or loss on any sale of assets, as determined in accordance with generally accepted accounting principles, for the prior fiscal year. A distribution by a person to a member of its controlled group is disregarded.

(b) *Determination rules.* For purposes of paragraph (a) of this section, the net value of a non-cash distribution is the fair market value of assets transferred by the person making the distribution, reduced by the fair market value of any liabilities assumed or consideration given by the recipient in connection with the distribution. Net value determinations should be based on readily available fair market value(s) or independent appraisal(s) performed within one year before the distribution is made. To the extent that fair market values are not readily available and no such appraisals exist, the fair market value of an asset transferred in connection with a distribution or a liability assumed by a recipient of a distribution is deemed to be equal to 200

percent of the book value of the asset or liability on the books of the person making the distribution. Stock redeemed is deemed to have no value.

(c) *Waivers.*

(1) *Extraordinary dividends and stock redemptions.* Notice under this section of the reportable event described in section 4043(c)(11) of ERISA related to extraordinary dividends and stock redemptions is waived except to the extent reporting is required under this section.

(2) *De minimis 10-percent segment.* Notice under this section is waived if the person making the distribution is a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(3) *Foreign entity.* Notice under this section is waived if the person making the distribution is a foreign entity other than a foreign parent.

(4) *Current-year small plan.* Notice under this section is waived if the plan had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(5) *Financial soundness.* Notice under this section is waived if —

(i) For each contributing sponsor of the plan, either the sponsor or the sponsor's highest level controlled group parent that is a U.S. entity is financially sound when the event occurs, or

(ii) The plan is financially sound for the plan year in which the event occurs.

**§ 4043.32 Transfer of benefit liabilities.**

(a) *Reportable event.* A reportable event occurs for a plan when —

(1) The plan makes a transfer of benefit liabilities to a person, or to a plan or plans maintained by a person or persons, that are not members of the transferor plan's controlled group; and

(2) The amount of benefit liabilities transferred, in conjunction with other benefit liabilities transferred during the 12-month period ending on the date of the transfer, is 3 percent or more of the plan's total benefit liabilities. Both the benefit liabilities transferred and the plan's total benefit liabilities are to be valued as of any one date in the plan year in which the transfer occurs, using actuarial assumptions that comply with section 414(l) of the Code.

(b) *Determination rules.*

(1) *Date of transfer.* The date of transfer is to be determined on the basis of the facts and circumstances of the particular situation. For transfers subject to the requirements of section 414(l) of the Code, the date determined in accordance with 26 CFR 1.414(l)-1(b)(11) will be considered the date of transfer.

(2) *Distributions of lump sums and annuities.* For purposes of paragraph (a) of this section, the payment of a lump sum, or purchase of an irrevocable commitment to provide an annuity, in satisfaction of benefit liabilities is not a transfer of benefit liabilities.

(c) *Waivers.*

(1) *Current-year small plan.* Notice under this section is waived if the plan had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *Financial soundness.* Notice under this section is waived if, for both the transferor plan (if it survives the transfer) and the transferee plan —

(i) For each contributing sponsor of the plan, either the sponsor or the sponsor's highest level controlled group parent that is a U.S. entity is financially sound when the transfer occurs, or

(ii) The plan is financially sound for the plan year in which the transfer occurs.



**§ 4043.33 Application for minimum funding waiver.**

A reportable event for a plan occurs when an application for a minimum funding waiver for the plan is submitted under section 302(c) of ERISA or section 412(c) of the Code.

**§ 4043.34 Loan default.**

(a) *Reportable event.* A reportable event occurs for a plan when, with respect to a loan with an outstanding balance of \$10 million or more to a member of the plan's controlled group —

- (1) There is an acceleration of payment or a default under the loan agreement, or
- (2) The lender waives or agrees to an amendment of any covenant in the loan agreement for the purpose of avoiding a default.

(b) *Notice date.* The notice date is 30 days after the person required to report knows or has reason to know of an acceleration or default under paragraph (a)(1) of this section, without regard to the time of any other conditions required for the acceleration or default to be reportable.

(c) *Waivers.*

(1) *De minimis 10-percent segment.* Notice under this section is waived if the debtor is not a contributing sponsor of the plan and represents a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity.* Notice under this section is waived if the debtor is a foreign entity other than a foreign parent.

### **§ 4043.35 Insolvency or similar settlement.**

(a) *Reportable event.* A reportable event occurs for a plan when any member of the plan's controlled group —

(1) Commences or has commenced against it any insolvency proceeding (including, but not limited to, the appointment of a receiver) other than a bankruptcy case under the Bankruptcy Code;

(2) Commences, or has commenced against it, a proceeding to effect a composition, extension, or settlement with creditors;

(3) Executes a general assignment for the benefit of creditors; or

(4) Undertakes to effect any other nonjudicial composition, extension, or settlement with substantially all its creditors.

(b) *Waivers.*

(1) *De minimis 10-percent segment.* Notice under this section is waived if the person described in paragraph (a) of this section is not a contributing sponsor of the plan and represents a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity.* Notice under this section is waived if the person described in paragraph (a) of this section is a foreign entity other than a foreign parent.

### **Subpart C — Advance Notice of Reportable Events**

#### **§ 4043.61 Advance reporting filing obligation.**

(a) *In general.* Unless a waiver or extension applies with respect to the plan, each contributing sponsor of a plan is required to notify PBGC no later than 30 days before the effective date of a reportable event described in this subpart C if the contributing sponsor is

subject to advance reporting for the reportable event. If there is a change in contributing sponsor, the reporting obligation applies to the person who is the contributing sponsor of the plan on the notice date.

(b) *Persons subject to advance reporting.* A contributing sponsor of a plan is subject to the advance reporting requirement under paragraph (a) of this section for a reportable event if —

(1) On the notice date, neither the contributing sponsor nor any member of the plan's controlled group to which the event relates is a person subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 or a subsidiary (as defined for purposes of the Securities Exchange Act of 1934) of a person subject to such reporting requirements; and

(2) The aggregate unfunded vested benefits, determined in accordance with paragraph (c) of this section, are more than \$50 million; and

(3) The aggregate value of plan assets, determined in accordance with paragraph (c) of this section, is less than 90 percent of the aggregate premium funding target, determined in accordance with paragraph (c) of this section.

(c) *Funding determinations.* For purposes of paragraph (b) of this section, the aggregate unfunded vested benefits, aggregate value of plan assets, and aggregate premium funding target are determined by aggregating the unfunded vested benefits, values of plan assets, and premium funding targets (respectively), as determined for premium purposes in accordance with part 4006 of this chapter for the plan year preceding the effective date of the event, of plans maintained (on the notice date) by the contributing sponsor and any members of the contributing sponsor's controlled group, disregarding plans with no unfunded vested benefits (as so determined).

(d) *Shortening of 30-day period.* Pursuant to § 4043.3(d), PBGC may, upon review of an advance notice, shorten the notice period to allow for an earlier effective date.

**§ 4043.62 Change in contributing sponsor or controlled group.**

(a) *Reportable event.* Advance notice is required for a change in a plan's contributing sponsor or controlled group, as described in § 4043.29(a).

(b) *Waivers.*

(1) *Small and mid-size plans.* Notice under this section is waived with respect to a change of contributing sponsor if the transferred plan has fewer than 500 participants.

(2) *De minimis 5-percent segment.* Notice under this section is waived if the person or persons that will cease to be members of the plan's controlled group represent a *de minimis* 5-percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the effective date of the reportable event.

**§ 4043.63 Liquidation.**

(a) *Reportable event.* Advance notice is required for a liquidation of a member of a plan's controlled group, as described in § 4043.30.

(b) *Waiver — de minimis 5-percent segment and ongoing plans.* Notice under this section is waived if the person that liquidates is a *de minimis* 5-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the effective date of the reportable event, and each plan that was maintained by the liquidating member is maintained by another member of the plan's controlled group.

**§ 4043.64 Extraordinary dividend or stock redemption.**

(a) *Reportable event.* Advance notice is required for a distribution by a member of a plan's controlled group, as described in § 4043.31(a).

(b) *Waiver — de minimis 5-percent segment.* Notice under this section is waived if the person making the distribution is a *de minimis* 5-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the effective date of the reportable event.

**§ 4043.65 Transfer of benefit liabilities.**

(a) *Reportable event.* Advance notice is required for a transfer of benefit liabilities, as described in § 4043.32(a).

(b) *Waivers.*

(1) *Complete plan transfer.* Notice under this section is waived if the transfer is a transfer of all of the transferor plan's benefit liabilities and assets to one other plan.

(2) *Transfer of less than 3 percent of assets.* Notice under this section is waived if the value of the assets being transferred —

(i) Equals the present value of the accrued benefits (whether or not vested) being transferred, using actuarial assumptions that comply with section 414(l) of the Code; and

(ii) In conjunction with other assets transferred during the same plan year, is less than 3 percent of the assets of the transferor plan as of at least one day in that year.

(3) *Section 414(l) safe harbor.* Notice under this section is waived if the benefit liabilities of 500 or fewer participants are transferred and the transfer complies with section 414(l) of the Code using the actuarial assumptions prescribed for valuing benefits in trusteed plans under § 4044.51-57 of this chapter.

(4) *Fully funded plans.* Notice under this section is waived if the transfer complies with section 414(l) of the Code using reasonable actuarial assumptions and, after the transfer, the transferor and transferee plans are fully funded as determined in accordance with §§ 4044.51

through 4044.57 of this chapter (dealing with valuation of benefits and assets in trustee terminating plans) and § 4010.8(d)(1)(ii) of this chapter.

**§ 4043.66 Application for minimum funding waiver.**

(a) *Reportable event.* Advance notice is required for an application for a minimum funding waiver, as described in § 4043.33.

(b) *Extension.* The notice date is extended until 10 days after the reportable event has occurred.

**§ 4043.67 Loan default.**

Advance notice is required for an acceleration of payment, a default, a waiver, or an agreement to an amendment with respect to a loan agreement described in § 4043.34(a).

**§ 4043.68 Insolvency or similar settlement.**

(a) *Reportable event.* Advance notice is required for an insolvency or similar settlement, as described in § 4043.35.

(b) *Extension.* For a case or proceeding under § 4043.35(a)(1) or (2) that is not commenced by a member of the plan's controlled group, the notice date is extended to 10 days after the commencement of the case or proceeding.

**Subpart D — Notice of Failure to Make Required Contributions**

**§ 4043.81 PBGC Form 200, notice of failure to make required contributions; supplementary information.**

(a) *General rules.* To comply with the notification requirement in section 303(k)(4) of ERISA and section 430(k)(4) of the Code, a contributing sponsor of a single-employer plan that is covered under section 4021 of ERISA and, if that contributing sponsor is a member of a parent-subsidiary controlled group, the ultimate parent must complete and submit in accordance

with this section a properly certified Form 200 that includes all required documentation and other information, as described in the related filing instructions. Notice is required whenever the unpaid balance of a contribution payment required under sections 302 and 303 of ERISA and sections 412 and 430 of the Code (including interest), when added to the aggregate unpaid balance of all preceding such payments for which payment was not made when due (including interest), exceeds \$1 million.

(1) Form 200 must be filed with PBGC no later than 10 days after the due date for any required payment for which payment was not made when due.

(2) If a contributing sponsor or the ultimate parent completes and submits Form 200 in accordance with this section, PBGC will consider the notification requirement in section 303(k)(4) of ERISA and section 430(k)(4) of the Code to be satisfied by all members of a controlled group of which the person who has filed Form 200 is a member.

(b) *Supplementary information.* If, upon review of a Form 200, PBGC concludes that it needs additional information in order to make decisions regarding enforcement of a lien imposed by section 303(k) of ERISA and section 430(k) of the Code, PBGC may require any member of the contributing sponsor's controlled group to supplement the Form 200 in accordance with § 4043.3(d).

(c) *Ultimate parent.* For purposes of this section, the term "ultimate parent" means the parent at the highest level in the chain of corporations and/or other organizations constituting a parent-subsidary controlled group.

#### **PART 4204 — VARIANCES FOR SALE OF ASSETS**

- 7. The authority citation for part 4204 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1384(c).

- 8. Section 4204.12 is amended by removing the figures “412(b)(3)(A)” and adding in their place the figures “431(b)(3)(A)”.

**PART 4206 — ADJUSTMENT OF LIABILITY FOR A WITHDRAWAL SUBSEQUENT TO A PARTIAL WITHDRAWAL**

- 9. The authority citation for part 4206 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3) and 1386(b).

- 10. Section 4206.7 is amended by removing the figures “412(b)(4)” and adding in their place the figures “431(b)(5)”.

**PART 4231 — MERGERS AND TRANSFERS BETWEEN MULTIEMPLOYER PLANS**

- 11. The authority citation for part 4231 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1411.

- 12. In § 4231.2, the definitions of “actuarial valuation” and “fair market value of assets” are amended by removing the words “section 302 of ERISA and section 412 of the Code” where they appear in each definition and adding in their place the words “section 304 of ERISA and section 431 of the Code”.

- 13. In § 4231.6:

- a. Paragraph (b)(4)(ii) is amended by removing the figures “412(b)(4)” and adding in their place the figures “431(b)(5)”.

- b. Paragraph (c)(2) is amended by removing the words “section 412 of the Code (which requires that such assumptions be reasonable in the aggregate)” and adding in their place the words “section 431 of the Code (which requires that each such assumption be reasonable)”.



c. Paragraph (c)(5) is amended by removing the figures “412” and adding in their place the figures “431”.

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